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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, [illegible] 1904.

No. [illegible] 54.

THE UNITED STATES, APPELLANT,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JUNE 9, 1904.

(18,808.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 317.

THE UNITED STATES, APPELLANT,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May term, 1902, of said court, begun and held at the United States court house in the city of St. Paul, Minnesota, on the first Monday in May, to wit, the fifth day of May, A. D. 1902, before the Honorable Walter H. Sanborn and the Honorable Amos M. Thayer, circuit judges, and the Honorable John E. Carland, district judge.

Attest:

[SEAL.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit: On the twenty-fourth day of March, A. D. 1902, a transcript of record, pursuant to an appeal allowed by the circuit court of the United States for the district of Minnesota, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein the United States of America was appellant, and the Chicago, Milwaukee and St. Paul Railway Company et al. were appellees, which said transcript of record is in the words and figures following, to wit:

The United States of America, Complainant.

vs.

Chicago, Milwaukee & St. Paul, Railway Company, The Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thomson and O. C. Erichsrud, Defendants.

Pleas before the Honorable the Judges of the Circuit Court of the United States of America, for the Third Division of the District of Minnesota, of the January A. D. 1902 Term of said Court, held in the City of St. Paul, in said District, in the year 1902, A. D.

District of Minnesota—ss.

Be it remembered that on the 6th day of March A. D. 1893 came the above named complainant and filed its bill of complaint in the Clerk's office of said Court, in words and figures following, to wit:

1 In the Circuit Court of the United States in and for the District of Minnesota, Second Division.

The United States of America, Complainant.

vs.

The Chicago, Milwaukee & St. Paul, Railway Company, The Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thompson and O. C. Erichsrud, Defendants.

To the Honorable Judges of the Circuit Court for the District of Minnesota:

The United States of America, by W. H. H. Miller, its Attorney General, brings this its bill of complaint against The Chicago, Milwaukee & St. Paul Railway Company, a corporation created under and pursuant to the laws of the State of Wisconsin and owning and operating lines of railway in the State of Minnesota, The Southern Minnesota Railway Company, a corporation organized and existing under and pursuant to the laws of the State of Minnesota, and Michael Donovan, Thomas S. Thompson and O. C. Erichsrud, residents of the State of Minnesota, and complaining says:

1st. That by an act of Congress approved July 4, 1866, there was granted by the United States to the State of Minnesota certain public lands to aid in the construction of a railroad

from Houston in the County of Houston in said state, through the counties of Fillmore, Mower, Freeborn and Faribault to the Western boundary of said state.

2 2nd. That by said act of Congress, reference to which in full is hereby made, there was excepted from said grant any section or part of section within the limits of said grant, to which, at the time of the definite location of said railroad, it should appear that the right of pre-emption or homestead settlement had attached.

3rd. It was further provided by said act that when the Governor of the State of Minnesota certified to the Secretary of the Interior that certain specified portions of said road has been completed in a specified manner, then the Secretary of the Interior should certify the lands in alternate sections or parts of sections designated by odd numbers, situated as therein pointed out, to the State of Minnesota for the benefit of said railroad.

4th. That thereafter the State of Minnesota, by an act of the Legislature approved February 25, 1867, accepted said grant and granted to and vested in the Southern Minnesota Railroad Company a corporation then organized and existing under the laws of said state, all its rights in said granted land, subject to all of the conditions imposed by the said granting act of Congress, and by said act of said Legislature, and thereby the said Southern Minnesota Railroad Company became the beneficiary under said grant, subject, however, to all of its conditions and the conditions of the said act of February 25th, 1867.

5th. That the said Southern Minnesota Railroad Company thereupon proceeded with the work of the construction of said railroad and filed in the proper office a map of the definite location of its contemplated road opposite to the land hereinafter described, on the ..... day of ..... 18.... and not before.

3 That the entire line or route of said road was not definitely fixed until the ..... day of ..... 18....

6th. That prior to the definite location of said railroad opposite thereto, and prior to the withdrawal of the lands included within the boundary limits of said grant from disposition under the public land laws of your orator, a certain tract of land within the twenty (20) mile indemnity limits of said grants, as described in said act of Congress, to wit, the east half of the northwest quarter (E. ½ N. W. ¼) of section thirty-five (35), township one hundred one (101) north, range twenty-eight (28) west, Fifth P. M. Minnesota, was excepted from said grant and

the withdrawal from sale on account thereof by the homestead entry of one Lyman Barkley, who had theretofore entered the same as a homestead, which homestead entry was cancelled January 14, 1868; that by reason of the existence of said homestead entry, the tract of land hereinbefore described was excepted from the withdrawal for the benefit of said grant and after the cancellation of said entry, such tract became subject to entry under the homestead and pre-emption laws by the first legal applicant therefor.

7th. That on June 6, 1868, one Michael Donovan, being then and there qualified to make a homestead entry under and pursuant to the laws of the United States, regularly and in all things pursuant to the homestead laws of the United States, made application to the proper local land office in the State of Minnesota, to enter as a homestead the land hereinbefore described, which application was rejected by the local land officers for the reason, as stated by them, that the land covered thereby was railroad land and not subject to entry.

4 8th. That in addition to the tract hereinbefore described his application covered also the east half of the southwest quarter (E. ½ S. W. ¼) of Section twenty-six (26) in said township and range, which was embraced in the homestead entry of said Barkley, cancelled as heretofore alleged.

9th. That he was allowed by the local land office to enter said east half of the southwest quarter of section twenty-six and a final certificate thereto was issued to him May 18, 1875, and said land was patented to him July 1, 1875.

10th. That on the 29th day of November, 1870, and not before, the said Southern Minnesota Railroad Company selected said tract, to wit, the east half of the northwest quarter of Section thirty-five, within its indemnity limits on account of the aforesaid grant in lieu of lands situated within its place limits, and in pursuance of said selection, said tract of land was certified to the State of Minnesota for the benefit of the said railroad company, March 25, 1871.

11th. That such certification by the land department of your Orator was erroneous and void for the reason that, prior to the selection of said land by the said railroad company, there had attached thereto the homestead right of said Michael Donovan, the rejection by the local land officers of the application of said Donovan to enter said land as a homestead being improper, and said Donovan having in all things complied with the laws of the United States relating to homestead entries was entitled at the time of his said application to enter said lands as a portion of his homestead.

12th. That prior to his application to enter said land as a homestead, the said Michael Donovan entered into possession thereof for the purpose of settling upon and entering the same as a homestead under the laws of the United States, and that after his application to enter the same, made on the 6th day of July, 1867, was denied, as hereinbefore alleged he cultivated portions of said tract of land and continued each year to cultivate portions thereof until after the selection thereof by the railroad company as hereinbefore alleged, and during said time enclosed a portion thereof by fence.

13th. That on the 28th day of June, 1883, the said Michael Donovan again attempted at the proper land office to enter said land as an additional homestead, and then and there in due form applied so to enter said land, which application was refused by the officers in charge of said office, from which refusal the said Donovan duly appealed to the Commissioner of the General Land Office which appeal is still pending and undetermined.

14th. That on the 8th day of August, 1871, the State of Minnesota conveyed by deed to the Southern Minnesota Railroad Company said land, and on the 3rd day of March, 1877, the Southern Minnesota Railroad Company, having changed its name to the Southern Minnesota Railway Company, conveyed said land to the Southern Minnesota Railway Company.

15th. That thereafter on the 5th day of January, 1885, the said Southern Minnesota Railway Company, by contract in writing, agreed to sell the said tract of land to one A. Boyson for the [—] in instalments at various times, and upon such payments being made, agreed to convey said land to such purchaser, which said contract was not recorded; that on the 6th day of January, 1895, the said A. Boyson, with the consent of said railway company assigned said contract and all his right, title and interest in and to said land thereunder, to one N. C. Frederickson, and on the 1st day of April, 1885, the said N. C. Frederickson assigned said contract and all his right, title and interest in and to the said tract thereunder to said defendant Thomas S. Thompson, who now holds the same; that thereafter said Thomas S. Thompson assigned his interest in said contract to one O. C. Erichsrud for the purpose of securing to said Erichsrud the payment of an indebtedness due him from said Thompson; that thereafter, to wit, on the 20th day of March, 1888, by agreement between him and the said Thompson, and for the purpose of further securing said indebtedness the said Erichsrud procured from the said Southern Minnesota Railway Company a conveyance to himself of said land by deed that day executed, which was afterwards, on the

8th day of June, 1888, filed for record in the office of the Register of Deeds of Faribault County, Minnesota, and on said day recorded in Book 16 of Deeds, page 395; that your Orator is informed and believes and so charges the fact to be that said Erichsrud took said assignment and conveyance with full knowledge of the fact that the right and title of said Southern Minnesota Railway Company and all persons claiming by, through, or under it, in and to said real estate, was in dispute and that the certification of said real estate to the State of Minnesota for the benefit of said Railway Company was improper and without authority of law; and further that said Erichsrud took a conveyance of said real estate as se-
7 curity for a pre-existing debt and holds the legal title thereto for the benefit of said Thompson and as a mortgage only.

16th. That the Chicago, Milwaukee & St. Paul Railway Company became and is now the owner of the grant made by the act of Congress of July 5, 1866, instead of the aforesaid Southern Minnesota Railroad Company and the aforesaid Southern Minnesota Railway Company, and became and is the successor in interest of said companies and each of them, in and to said grant, entitled to all the benefits and charged with all of the conditions which before it became such successor were enjoyed by and charged upon its said predecessors and each of them, and now stands in place of the Southern Minnesota Railway Company and the said Southern Minnesota Railroad Company with regard to said grant and the lands granted and the certification made as aforesaid of the tract hereinbefore described to wit, the east half of the northwest quarter of section thirty-five, township one hundred and one North, Range twenty-eight West.

17th. That the foregoing facts appearing, the Secretary of the Interior of the United States, under and pursuant to an act of Congress approved March 3, 1887 entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands and for other purposes," reference to which said act in full is hereby made, cited the said Chicago, Milwaukee & St. Paul Railway Company as the successor in interest of the said Southern Minnesota Railroad Company and the said Southern Minnesota Railway Company, to show cause
8 why proceedings should not be commenced against it for the recovery of said tract of land, under and pursuant to the provisions of said last mentioned act, on the ground that said tract was improperly, erroneously and without authority of law certified to the beneficiary under said grant; it having been, at and prior to the definite location of

said road and at and prior to the selection as aforesaid by the said Southern Minnesota Railroad Company, excepted from the operation of said grant by the application for homestead entry heretofore set out.

18th. That in response to said citation or order to show cause, the said Chicago, Milwaukee & St. Paul Railway Company, by its attorney, appeared before the proper officers of the Interior Department and claimed that upon the facts hereinbefore set out, said land was not excepted from the operation of said grant and was properly certified to the said State of Minnesota, as hereinbefore alleged, and as a further claim and in bar of any proceeding under the said last mentioned act of Congress, alleged and showed that in an action in the District Court of the County of Faribault in the State of Minnesota, wherein Michael Donovan was plaintiff and said Thomas S. Thompson defendant, it was held and decided by the said District Court,—the title to said land and the right to possession thereof being then in question as between said parties,—that said Michael Donovan was not the owner and entitled to the possession of said land, and that said Thomas S. Thompson was the equitable owner thereof and entitled to possession of the same.

9 19th. That the said Secretary of the Interior held and decided upon said hearing that the land in controversy was excepted from the said grant and the operation thereof, in view of the facts hereinbefore stated, and that the same had been improperly and erroneously certified to the said state of Minnesota for the purposes hereinbefore set out, and that the judgment of the said District Court of the State of Minnesota was not a bar as against the Government to prevent it from proceeding to recover said land under and pursuant to said act, and thereupon caused a proper demand in writing to be made upon said company for the re-conveyance to the United States of said tract of land within ninety days thereafter, which said demand was made on April 9, 1889, but that said company refused to comply therewith and has ever since refused and still refuses so to do.

20th. And your orator alleges that the act of Congress of March 3, 1887, herein referred to, reference in full to which is hereby made, fully provides for the adjustment of conflicting claims to the lands therein described as being found to be excepted from the operation of unadjusted land grants arising between claimants thereto under the homestead or pre-emption laws of the United States, actual settlers thereon, and per-

sons purchasing or contracting to purchase the same from the railroad company claiming to be entitled thereto.

21st. That at the time of the commencement and trial of the action in the District Court of Fairbault County hereinbefore referred to, and the rendition of judgment therein, the said act of Congress has not been passed and no action had
10 been taken by your orator to recover said tract of land from the said railroad company.

22nd. That the land grant hereinbefore referred to for the benefit of the said Southern Minnesota Railway Company is unadjusted, and that this action is brought by and under the authority of and pursuant to the said act of Congress, approved March 3, 1887.

23rd. That the said Michael Donovan, Thomas S. Thompson and O. C. Erichsrud each claim an interest in said real estate, and your orator prays that they may be required to answer herein as to such interest, if any they have.

And may it please your Honors to grant unto your Orator a writ of subpoena issuing to and under the seal of this Court, directed to the defendants, the Chicago, Milwaukee & St. Paul Railway Company, The Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thompson and O. C. Erichsrud, and each of them, commanding them at a certain day and under a certain penalty therein to be specified, personally to be and appear before your Honors in this Honorable Court and then and there to answer (but not under oath, answer under oath being hereby expressly waived) all and singular the premises and to stand to perform and abide such order and decree therein as to your Honors shall seem meet and your Orator will ever pray.

Wherefore, your Orator prays for a decree herein against the defendants and each of them, that the land hereinbefore described be restored to your Orator; that the certification thereof to the State of Minnesota and the conveyance thereof by the said state to the said Southern Minnesota Railroad Com-
11 pany, the conveyance thereof by the said Southern Minnesota Railroad Company to the said Southern Minnesota Railway Company, the conveyance thereof by the said Southern Minnesota Railway Company to the said O. C. Erichsrud, and the contract of sale by the said Southern Minnesota Railway Company, hereinbefore referred to, and each of said con-

veyances and contracts, be set aside and canceled, and for such other and further relief as to your Honors may seem meet and just.

W. H. H. MILLER,
Attorney General.
By Robert G. Evans,
Spl. Asst. U. S. Attorney.
EUGENE G. HAY,
Solicitors for Complainant.

ROBERT G. EVANS,
Special Assistant U. S. Attorney,
of Counsel.

Indorsed: Filed March 6th, 1893. Oscar B. Hillis, Clerk. By Stephen Thorne, Deputy.

Thereafter and on the 20th day of June 1894 the following amendment to bill and order was filed of record in said cause, to-wit:

In the Circuit Court of the United States In and for the District of Minnesota, Second Division.

United States of America, Complainants,
v.
The Chicago, Milwaukee & St. Paul Railway Company, The Southern Minnesota Railway Company, Michael Donovan, Thomas S .Thompson and O. G. Erichsrud, Defendants.

Order.

Now, on motion of Robt G. Evans, Special Assistant United States Attorney, Counsel for Complainants in the above entitled cause, and upon the consent in writing of the defendants, The Chicago, Milwaukee & St. Paul Railway Company, & The Southern Minnesota Railway Company, ——— and it appearing to the court that the other defendants herein have not answered or demurred to the bill of complaint, and that as to them no issue has been joined,

It is ordered that the bill of complaint herein be, and the same hereby is, amended as set out in the proposed amendments attached hereto, and that the demurrer heretofore interposed to the original bill of complaint by the defendants, The Chicago, Milwaukee & St. Paul Railway Company and the Southern Minnesota Railway Company shall be and stand as a demurrer to the said bill of complaint as amended.

Dated June, 1894.

R. R. NELSON, Judge.

13 In the Circuit Court of the United States In and for the District of Minnesota, Second Division.

United States of America, Complainants,

v.

The Chicago, Milwaukee & St. Paul Railway Company, The Southern Minesota Railway Company, Michael Donovan, Thomas S. Thompson and O. C. Erichsrud, Defendants.

The complainants in the above entitled action hereby amend their bill of complaint filed in said action, as follows, to-wit:

By inserting therein, in place of the first subdivision of said bill of complaint, the following:

"That by an act of congress approved July 4, 1866, there was granted by the United States to the State of Minnesota, to aid in the construction of a railroad from Houston in the County of Houston in said state, through the Counties of Fillmore, Mower, Freeborn and Faribault, to the western boundary of the state, every alternate section of land, designated by odd numbers, to the amount of five (5) alternate sections per mile on each side of said road."

By inserting therein, in place of subdivision second, the following:

"That by said act of congress, reference to which in full as found in Volume 14, Statutes at Large, page 87, is hereby made it was further provided as follows: But in case it shall appear that the United States have, when the lines or route of said road are definitely located, sold any section or part thereof granted as aforesaid, or that the right of pre-emption or

14 homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections or parts of sections designated by odd numbers as shall be equal to such lands as the United States have so reserved or otherwise appropriated, or to which the right of homestead or pre-emption settlement has attached as aforesaid, which lands, thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by the said State of Minnesota for the purposes and uses aforesaid; provided that the land so selected shall in no case be located more than twenty (20) miles from the lines of said road. And it was further provided by said act as follows: "That as soon as the Governor of

said state shall file, or cause to be filed with the Secretary of the Interior, maps designating the routes of said road, then it shall be the duty of the Secretary of the Interior to withdraw from market lands embraced within the provisions of this act."

By filling the dates left blank in subdivision fifth of said bill of complaint, so that the same will show that the line of the route of the defendant's road was definitely located opposite to the land in controversy on the 10th day of December, 1866, and that the entire line or route of said road was not definitely fixed or located until the 4th of May, 1871. And by adding to said fifth subdivision the following:

"That an order was made by the Secretary of the Interior withdrawing the lands embraced within the provisions of said act, from market on September 10, 1866.

15 By inserting therein, in place of subdivision sixth of said bill of complaint, the following:

"That on the 21st day of June, 1866, one Lyman Barkley, being then and there qualified so to do, duly and regularly and in all things pursuant to the homestead laws of the United States, entered the east half of the northwest quarter (E. 1-2 NW 1-4) of Section thirty-five (35), Township one hundred one (101) north of Range twenty-eight (28) west, Fifth P. M., Minesota, as a homestead which tract afterwards fell within the twenty (20) mile indemnity limits of said grant as described in said act of congress; that the homestead entry of said Barkley was at said date accepted and approved by the proper officers of the land department of your orator and from said day became and continued to be and was, until the time hereinafter mentioned, and approved, recognized and existing homestead entry of record in the proper local and general land offices of the United States, attached to the tract aforesaid. That said entry was canceled January 14, 1868, and not before, and that by reason of the existence of said homestead entry as aforesaid the tract of land hereinbefore described was excepted from said grant and the withdrawal made on account thereof, and that from and after the cancellation of said entry, such tract became again subject to entry under the homestead and pre-emption laws of the United States by the first legal applicant therefor.

By inserting at the end of subdivision eighteenth, after the word "same", the following:

"Which said finding and decision was made March 24, 1887, and judgment in pursuance thereof was entered January 4, 1888."

ROBERT J. EVANS,
Special Assistant United States Attorney,
Of Counsel for Complainant.

16 We hereby consent that the foregoing proposed amendments may be made and incorporated in and made a part of the original Bill and that an order of court may be entered allowing the same, upon the understanding that the demurrer heretofore interposed in behalf of the Chicago, Milwaukee & St. Paul Railway Company and the Southern Minnesota Railway Company to the original bill of complaint shall stand as a demurrer to the amended bill of complaint.

Dated January 13, 1894.

JOHN R. CARY,
For Railway Company, and
Thompson and Erichsrud.

Indorsed: Amendment to Bill. Filed June 20th, 1894. Oscar B. Hillis, Clerk. By Stephen Thorne, Deputy.

Thereafter and on March 4, 1901, the following Supplemental Bill was filed of record in said cause, to-wit:

17 Circuit Court of the United States, for the District of Minnesota, Third Division.

The United States of America
vs.
Chicago, Milwaukee & St. Paul Railway Company, The Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thomson and O. C. Erichsrud.

Supplemental Bill.

To the Honorable Judges of Said Court:

Your orator by leave files this, its supplemental bill in the above entitled action and alleges:

(1) That said action was commenced in 1893 to recover back the title to the east ½ of the Northwest ¼ of Section 35, Town 101, N., Range 28 in Faribault County, Minnesota, as having been erroneously certified to the State of Minnesota, and conveyed by said State to the Southern Minnesota Railroad Company, and by the said Southern Minnesota Railway Company to the defendant, O. C. Erichsrud, as appertaining to the grant made by Congress July 4, 1866, to said State to aid in the construction of the Southern Minnesota
18 Railroad, and your orator hereby refers to the facts stated in the original bill for a more particular account of the facts in said action. That due service was made upon the said defendants Railway Companies, and upon the defendant Donovan, but that the defendants Erichsrud and Thomson were not found and no service was made upon them nor have they appeared in said action. That the said defendants, Rail-

way Companies jointly answered in said action to which a replication was duly filed. That no testimony has been taken in said action. That said action by stipulation or understanding of counsel was not removed but was allowed to stand over without prejudice, awaiting the decision of certain cases pending in the U. S. Supreme Court, which it was thought might have a bearing upon the facts in this action.

(2) And your orator states that since the commencement of said action, the said O. C. Erichsrud has departed this life intestate, leaving surviving him Anna Erichsrud, his widow, and Addie J. Erichsrud, Mabelle H. Erichsrud and Julia P. Erichsrud, his children, and only heirs at law, and that on the 24th day of May, 1899, they joined in a deed conveying said tract of land to Louis K. Woodwick who now holds the legal title to the same. But your orator alleges on information and belief that the said Woodwick was not a bona fide purchaser of said tract of land, but took a conveyance of the same at the request and for the accommodation and in trust for the said widow[s] and heirs of the said O. C. Erichsrud, and also with full notice and knowledge of the pendency of this action and of the equitable claim and rights to the same of the said Michael Donovan, as set forth in the original
19 bill in this action. That said tract of land is of the value of over $2,000.

(3) Wherefore, May it please your Honors to grant unto your orator, a writ of subpoena, issuing to and under the seal of this Court, directed to the said Louis K. Woodwick, Anna Erichsrud, Addie J. Erichsrud, Mabelle H. Erichsrud and Julia P. Erichsrud, and each of them, commanding them at a certain day and under a certain penalty therein to be specified, personally to be and appear before your Honors in this honorable Court in said action and then and there to answer, but not under oath, the answer under oath being hereby waived, all and singular the premises, and to stand to, perform and abide by such order and decree in said action as to your Honors shall seem meet and your orator will ever pray.

(4) Wherefore, Your orator prays for a decree in said action as prayed for in the original bill, also that the said conveyance to the said Louis K. Woodwick be declared and decreed to be canceled, set aside and held for naught, and for other proper relief.

ROBT G. EVANS,
U. S. District Attorney.

Filed March 4th, 1901. Henry D. Lang, Clerk.

And on the 11th day of August, 1894, the following Answer of the Ry Cos was filed of record in said cause, to wit:

20 Circuit Court of the United States, District of Minnesota, Second Division.

The United States of America
vs.
Chicago, Milwaukee & St. Paul Railway Company, the Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thomson, and O. C. Erichsrud.

The joint and several answers of the Chicago, Milwaukee & St. Paul Railway Company, and the Southern Minnesota Railway Company, two of the defendants, to the bill of complaint of the United States of America, Complainant.

These defendants now and at all times hereafter saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the Complainant's said Bill of Complaint contained, for answer thereunto, or unto so much, or such parts thereof as these defendants are advised is material for them to make answer unto, answering:

1st. Admit and say that by an Act of Congress, approved July 4th, 1866, there was granted by the United States to the State of Minnesota, certain public lands to aid in the construction of a railroad from Houston, in the County of Houston, in said State, through the Counties of Fillmore, Mower,
21 Freeborn and Fairbault, to the western boundary of said State. That by said Act of Congress, reference to which in full is hereby made, there was granted to the State of Minnesota for the purpose of aiding the construction of the railroad from Houston, in the County of Houston, through the Counties of Fillmore, Mower, Freeborn and Fairbault, to the western boundary of the State, every alternate section of land designated by odd numbers to the amount of five alternate sections per mile on each side of said road; but in case it should appear that the United States had, when the lines or route of said road were definitely located, sold any section or part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement had attached to the same, or that the same had been reserved by the United States for any purpose whatever, then it should be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land in alternate sections or parts of sections, designated by odd numbers, as should be equal to such lands as the United States had sold, reserved or otherwise appropriated, or to which the right of homestead settlement or pre-emption had attached as aforesaid, which lands thus indicated by odd numbers and sections,

by the direction of the Secretary of the Interior, shall be held by said State of Minnesota for the purposes and uses as aforesaid.

22 2nd. That by an Act of the Legislature of the State of Minnesota, approved on the 25th day of February, 1867, the lands so granted by Congress to the State of Minnesota were accepted upon the terms, conditions and restrictions therein prescribed, and the State of Minnesota, assumed and undertook the trust created by such grant and pertaining to said line of road. That all the lands, interests, rights, privileges and powers granted to and conferred upon the State of Minnesota, for the purpose of aiding in the construction of a railroad from Houston, in Houston County, through the Counties of Fillmore, Mower, Freeborn and Fairbault, to the western boundary of the State, were thereby granted to and vested in the Southern Minnesota Railroad Company.

3rd. That the said Southern Minnesota Railroad Company was a corporation of the State of Minnesota, organized under and by virtue of its laws and on the 29th day of March, 1864, and at the time of the making of said grant was engaged in the construction of the road from La Crescent by the way of Houston, to the western boundary of the State. That prior to the acceptance of said grant by the State of Minnesota on the 25th day of February, 1867, it had built and constructed its railroad from La Crescent to Houston, in said State, and had located the same opposite to the lands in question, and westerly therefrom to the State Line, and had filed its map of location with the Secretary of the Interior. That
23 afterwards the location of said road from a point at or about Range 40, west of the 5th P. M., to the State Line was disapproved by the Secretary of the Interior, and that subsequently the line from that point was relocated to the State Line and accepted as relocated.

4th. It was provided in and by said Act that when the Governor of the State of Minnesota certified to the Secretary of the Interior that any section of ten consecutive miles of said road had been completed he should issue to the State any of the lands in alternate sections or parts of sections, designated by odd numbers situated within 20 miles of the road as completed, and lying co-terminus to said completed section of 10 miles, for the benefit of the road having completed the ten consecutive miles as aforesaid, but provided that the co-terminus rule thereby applied should not extend to such lands as are taken by said railroad company to make up deficiencies, provided that no land to make up such deficiencies shall be taken at any point within ten miles upon each side of the line of said road.

5th. That the Southern Minnesota Railway Company thereafter proceeded with the work of the construction of said railroad, and completed the same to Winnebago City in the State of Minnesota within the time of the grant, and according to its terms and conditions in the year 1870. That as these defendants are informed and believed the line of said road was definitely located opposite the land in question, and a map thereof filed with the Secretary of the Interior December 10th, 1866. That the original location of said line west of Range 40, was not accepted by the Secretary of the Interior, as above set forth, but said line from that point westward was re-
24 located, and a map thereof filed and accepted by the Secretary of the Interior in May, 1867, as appears from the records in the office of the Secretary of the Interior, but they have no knowledge thereof except such as is derived from the record of the filing of said map.

6th. And these defendants further answering say that they have no knowledge as to whether one Lyman Barclay ever made a homestead entry on the east half of the northwest quarter of section 35, township 101 north, range 28 west, 5th P. M., Minnesota, and that neither of these defendants ever knew or had any knowledge or information that such an entry had been made until a suit was instituted in the District Court of Minnesota by Michael Donovan vs. Thomas Thomson, a purchaser of said land, and was then in possession of the premises as such purchaser, and on information and belief they say that said piece of land was not excepted from said grant, and if any such entry was ever made, that it had been abandoned long before the making of said grant, and that the said pretended entry was cancelled January 14th, 1868, and said land restored to the public lands as a part thereof, and these defendants, on information and belief, deny that by reason of the existence of said homestead entry, if any such entry every existed such tract of land was excepted from the benefit of said grant, and further say that after said cancellation thereof, said tract became subject to entry or selection under said grant, the same as other public lands, and allege and claim that upon the cancellation of said Barclay's entry, the tract became subject to selection on account of the grant, or to entry, under the pre-emption or homestead laws,
25 by the first legal applicant. That there was no encumbrance or charge upon said land at the time it was selected as indemnity under said grant, and that it was legally and lawfully selected by said Southern Minnesota Railroad Company as a part of the indemnity to which it was entitled under said grant, and said defendants, on information and belief, expressly deny that the said entry of the said Barclay,

after it was cancelled, operated to segregate or set apart this piece of land from the other public lands within said grant, so as to prevent its selection as a part of said indemnity. And further say that after the cancellation of said entry, January 14th, 1868, the said 80 acres became a part of the public lands of the United States, subject to entry or selection by any party entitled to enter or select public lands, and that it was competent for the said Southern Minnesota Railroad Company, as the beneficiary of said grant, to select said 80 acres as lieu land under said grant, and it was not prohibited from selecting said 80 acres after the cancellation of said homestead entry, on account of its having been previously covered by the homestead claim, and this defendant denies all the matters and things stated in the sixth paragraph of said bill, except as herein stated and admitted.

7th. On information and belief the said defendants further answering deny that on June 6th, 1868, one Michael Donovan, being then and there qualified to make a homestead entry under and pursuant to the laws of the United States, and in all things pursuant to the homestead laws, made application to the proper local land office in the State of Minnesota,
26 to enter as a homestead the land hereinafter described. That there is no record of any such entry or application for such entry, but that it does appear on the records of the General Land Office that the said Michael Donovan, at or about that time, made application to enter a certain other 80 acres, and did enter the same as a homestead, and that if he ever had any intention of entering the land in question he abandoned such intention, and never made or filed any application therefor, while it remained a part of the public land, and that at the time it was selected by the railroad company it was a part of the public lands within the indemnity limits and subject to entry or selection as such.

8th. These defendants further answering admit and say that on the 29th day of November, 1870, the said Southern Minnesota Railroad Company selected the said east half of the Northwest quarter of Section 35, being within its indemnity limits on account of the aforesaid grant in lieu of land situated within its place limits and in pursuance of said selection said tract of land was certified by the Secretary of the Interior to the State of Minnesota for the benefit of said railroad company March 25th, 1871, and further say that at the time of said selection, there was no homestead or other claim on said land, but that it was a part of the public lands within the indemnity limits to said grant, and that said Southern Minnesota Railroad Company was entitled to enter the same as a part of its indemnity, in lieu of lands disposed of in its place limits, and

said defendants deny that such certification by the land
27 department of the complainant was erroneous and void for the reason that prior to the selection of said land by the said railway company there had attached thereto the homestead right of said Michael Donovan or for any other reason, and deny that rejection by the local land officers, if made, of the application of said Donovan to enter said land as a homestead was improper, and deny that said Michael Donovan was ever entitled to enter said land as a homestead, or that any homestead right remained attached to said 80 acres of land at the time or after the selection by said Southern Minnesota Railroad Company, and on information and belief deny that the said Michael Donovan prior to his pretended application to enter said 80 acres as a homestead, entered into possession thereof for the purpose of settling upon, and entering the same as a homestead, under the laws of the United States. Deny that he ever made application to enter the same on the 6th day of July, 1867, or at any other time or that he was in possession, or remained in possession thereof until after the rendition of the judgment in the District Court of the State of Minnesota, mentioned in said bill, or that he cultivated portions of said 80 acres until after the selection thereof by the railroad company, or enclosed a portion thereof by fence, and that any and all acts of the said Michael Donovan in reference to said 80 acres, if any were made or performed were trespasses without authority of law.

9th. That these defendants have no knowledge, information, or belief as to whether said Michael Donovan on the 28th day of June, 1883, attempted, at the proper land office, to enter said land as an additional homestead, or that he then and there
28 applied so to enter such land, or whether said application was refused by the officers in charge of said offices, or whether said Donovan duly appealed to the Commissioner of the General Land Office, or whether such appeal is still pending and undetermined, but say that inasmuch as said 80 acres were certified to the State of Minnesota, March 25th, 1871, any attempt at any time thereafter to enter the same at any land office was unauthorized and created no right whatever in behalf of said Michael Donovan, and that such application and appeal from the decision of the land officer refusing to allow it to be made was unauthorized and without any legal force or effect whatever.

10th. Defendants admit and claim that on the 8th day of August, 1871, the State of Minnesota conveyed by deed to the Southern Minnesota Railroad Company said land, and that

thereby the Southern Minnesota Railroad Company became the owner thereof in fee simple.

And further answering deny that the Southern Minnesota Railroad Company ever changed its name to the Southern Minnesota Railway Company, or that it ever conveyed said land to the Southern Minnesota Railway Company in any other manner than is hereinafter specified and stated.

11th. And these defendants, further say that no grant of land was ever made by the Congress of the United States to the State of Minnesota for these defendants, and further deny that the State of Minnesota, or Congress of the United States, ever conveyed or granted to the said defendants, or either of them any lands whatever so as aforesaid granted to the State of Minnesota by the Act of Congress approved on the 4th day of July, 1866.

29 They expressly deny that they ever had or owned any such land grant, or that they or either of them, ever received any of said lands granted by said Act of Congress to the State of Minnesota, from Congress or from the said state of Minnesota, and they further expressly deny that the said Southern Minnesota Railroad Company ever granted to these defendants, or either of them, the said grant of land, or the right to manage or control the same, or to receive the benefits thereof, or that they ever received said grant of land in any manner, or that they ever assumed or became charged with the duties, obligations, or liabilities, if any, resting on the said Southern Minnesota Railroad Company, in reference to said lands and further deny that they or either of them are the successor or successors of the Southern Minnesota Railroad Company, or liable for its debts or obligations in any manner whatever.

12th. And these defendants further answering on information and belief say that on September 24th, 1867, the said Southern Minnesota Railroad Company made and executed a mortgage of its entire road and property to Samuel B. Ruggles and Albon P. Man, as trustees, to secure 3600 bonds of One Thousand Dollars each, bearing eight per cent interest, and on the same day, but subsequent to said first mortgage, executed another mortgage to Samuel B. Ruggles and Albon P. Man, to secure 3600 bonds of One Thousand Dollars each, bearing seven per cent interest, known as the equipment bonds, and that each of said mortgages purported to convey to said trustees the entire railroad, its property and equipment
30 of every name and nature, together with all the lands received by said Company in virtue of said land grant

so as aforesaid made by Congress to the State of Minnesota, and by said State conferred upon said Company. That after making said mortgage said Southern Minnesota Railroad Company issued $3,332,000 bonds under said construction mortgage and $1,252,000 of bonds, under the equipment mortgage, and that the proceeds thereof were used in constructing and equipping said railroad from LaCrescent by way of Houston to Winnebago City, a distance of about 167½ miles, in all respects as required by said Act of Congress, and that afterwards and in pursuance of said Act and the Act of the State of Minnesota, said Southern Minnesota Railroad Company received from the State of Minnesota deeds of the lands, so as aforesaid granted by Congress to the State of Minnesota to aid in the construction of said road, and by the said State conferred upon said railroad, and that thereby the said Southern Minnesota Railroad Company became the owner in fee of all the lands, so as aforesaid granted to the State of Minnesota by the said Act of Congress, and conferred by deed by said State upon the said Southern Minnesota Railroad Company. That by the terms of said mortgages the said Southern Minnesota Railroad Company was authorized to sell said lands to actual purchasers, and apply the proceeds to the construction of said road, and that the great majority of said lands were so sold
31 by the said Southern Minnesota Railroad Company, to actual settlers, and the proceeds thereof were so used in constructing said road. That said Southern Minnesota Railroad Company afterwards and on the first day of April, 1872, made default in the payment of the interest on said construction bonds, and subsequently and on July 1st, 1872, defaulted in the payment of interest on said equipment bonds.

13th. That afterwards in the month of October, 1872, the said Samuel B. Ruggles and Albon P. Man, trustees, commenced separate suits to foreclose said mortgages in the Circuit Court of the United States for the District of Minnesota, that process was issued and served upon the said Southern Minnesota Railroad Company and other lienors upon said property, and that such proceedings were had in said foreclosure suits, that final decrees for the sale and foreclosure of said property were entered in each suit May 27th, 1874. That afterwards on the 10th day of February, 1877, said mortgaged property was sold upon the decree rendered upon the equipment mortgage, subject to the lien of the prior mortgage known as the construction mortgage, by a United States Master in Chancery of the District of Minnesota, and was purchased by A. P. Man and H. H. Cammann, and for the benefit of the bondholders under said equipment mortgage, and that

said sale was duly confirmed by said Circuit Court of the United States, and a deed executed by the Master in Chancery to said purchasers. Thereby the entire property of the said Southern Minnesota Railroad Company, together with all the lands which had been deeded to them by the State of Minnesota, and still remain in said company, were conveyed to said purchasers, and they became the owners thereof in fee, including the premises in question to wit: The east half
32 of the northwest quarter of section thirty-five, township one hundred and one north, range twenty-eight west, fifth principal meridian.

14th. That afterwards and on the 3rd day of March, 1877, the said A. P. Man and H. H. Cammann, under the provisions of chapter 30, of the laws of 1876 of the State of Minnesota, organized as such purchasers the Southern Minnesota Railway Company, and transferred to the Company so organized all the property, lands and other effects, so as aforesaid purchased by them at said foreclosure sale of said mortgage, subject, however, to the [lieu] of the first, or construction mortgage above described. That said Southern Minnesota Railway Company so organized by the purchasers under said foreclosure sale immediately took possession of said railroad, its property and franchised lands and tenements of every description, and from that time continued to own, manage and control the same.

That subsequently the said Southern Minnesota Railway Company purchased and acquired the railroad from Wells to Mankato, also the railroad from Winnebago City to Sioux Falls, and afterwards and on the first day of January, 1880, sold and transferred the whole of said railroad, together with all the stock of the Southern Minnesota Railway Company to the Chicago, Milwaukee & St. Paul Railway Company, and that the defendant, the Chicago, Milwaukee & St. Paul Railway Company immediately thereafter took possession of said property, and ever since has owned and [and] controlled
33 the same for its own use and benefit. That the lands in question, and other lands owned by the Southern Minnesota Railway Company, in virtue of its purchase at said foreclosure sale, were allowed to remain in the name of said Company, but were managed and controlled by the said Chicago, Milwaukee & St. Paul Railway Company, as the equitable owner thereof, but in the name of said Southern Minnesota Railway Company.

15th. The said defendants, further answering say, that afterwards, and on the 5th day of January, 1885, the said Chicago, Milwaukee & St. Paul Railway Company, acting in the

name of the Southern Minnesota Railway Company, by contract in writing, agreed to sell the said tract of land in question, to the defendant, A. Boyesen, for the sum of $480.00, to be thereafter paid in installments at various times, and upon such payments being made agreed to convey said land to such purchaser, a copy of which said contract is hereto annexed, and marked Exhibit "A." That on 6th day of January, 1885, said A. Boyesen, with the consent of said defendants, assigned said contract and all his right, title, and interest in and to said land thereunder, to N. C. Fredericksen, and on the 1st day of April, 1885, the said N. C. Fredericksen assigned said contract, and all his rights, title and interest in and to said tract thereunder to said defendant, Thomas S. Thomson, and afterwards on the 3rd day of February, 1888, the said Thomson assigned the same to O. C. Erichsrud, and that as these defendants are informed and believe, the assignment to O. C. Erichsrud was made by said Thomson for the purpose of securing money at that time borrowed of said Erichsrud to pay the balance due on said contract to these defendants,
34 and afterwards and on the 14th day of February, 1888, the said Erichsrud paid the balance due on said contract to these defendants.

That after the making of the contract between the defendants Southern Minnesota Railroad Company and A. Boyesen, these defendants, for the reasons entirely separate and apart from the matters here in controversy, deemed it advisable that title to the lands standing in the name of the Southern Minnesota Railroad Company, which were purchased by the defendants Chicago, Milwaukee & St. Paul Railway Company on the 1st day of January, 1880, should be transferred in form to the Chicago, Milwaukee & St. Paul Railway Company, and in pursuance of that determination, the lands in question, with the other lands so standing in the name of said Southern Minnesota Railway Company, were by deed conveyed to the defendant Chicago, Milwaukee & St. Paul Railway Company, the lands in question being conveyed subject to the contract so as aforesaid made with A. Boyesen, and preserving his rights and the rights of his assigns in said contract, and when full payment had been made on said contract, a deed of said premises to said Erichsrud was executed in the name of the defendant Chicago, Milwaukee & St. Paul Railway Company to him and as these defendants believe he holds said lands for said Thomson, and as security for the money advanced by him for said Thomson in payment of the balance due on said contract.

The said defendants further say that as to the allegation that Thomson assigned said contract to Erichsrud to secure prior

indebtedness owing by said Thomson, these defendants have no knowledge or information, and therefore deny the same.

35 The defendants, on their knowledge as to themselves and on their information and belief as to the others depending, deny that at the time of making said contract with Boyesen that they or any or either of them had any knowledge that there was any dispute as to the title of said land, or any infirmity in the title thereto, or that they had any knowledge that the certification of said real estate to the State of Minnesota for the benefit of said Railway Company, was improper, and without authority of law, but on the contrary that said Boyesen and Thomson were bona fide purchasers thereof without any knowledge or information that their title was in any manner defective, and claim that all their action in the matter of purchasing and paying for said land was in good faith.

The Chicago, Milwaukee & St. Paul Railway Company, defendant on its knowledge, and the other defendants, on information and belief, deny that it is now, or ever was, the owner of the grant by Act of Congress of July, 1866, instead of the aforesaid Southern Minnesota Railroad Company, and deny that the Southern Minnesota Railway Company was ever the owner of said grant. The said Chicago, Milwaukee & St. Paul Railway Company, on knowledge, and the other defendant, on information and belief deny that it ever became the successor in interest of said company, or either of them in and to said grant, or entitled to all or any of the benefits, and charged with all or any of the conditions which before it became such successor, were enjoyed by and charged upon its said predecessors, or either of them, or that it now stands in place of the Southern Minnesota Railway Company, or of the said Southern Minnesota Railroad Company, with
36 regard to said grant, or the land granted and the certification made, as aforesaid, of the tract hereinbefore described, or any other part or portion of said grant. That neither this defendant, the Chicago, Milwaukee & St. Paul Railway Company or the Southern Minnesota Railway Company, was ever the beneficiary of the grant made by Congress to the State of Minnesota, but that the same was conferred by the State of Minnesota upon the Southern Minnesota Railroad Company, and that these defendants, or either of them, have no connection whatever therewith, except that in the usual manner they have purchased some of the lands conveyed by said grant, as above described, after it had been conveyed to said Southern Minnesota Railroad Company. These defendants, further answering, say that they have no knowledge as to the action of the Secretary of the Interior, under the

Act of Congress, approved March 3rd, 1887, but say whatever action was taken thereunder by him, was without authority and void, and needs no answer from this defendant.

The defendants further say that the land grant to the Southern Minnesota Railroad Company was not within the terms of the Act of March 3rd, 1887: that said grant was not an unadjusted grant: that the grant was adjusted nearly twenty years prior to the passage of that act, and that the beneficiary of said grant is not now before the court, if in existence, and the defendants submit that there is a defect of parties in this action for the reason that the said Southern Minnesota Railroad Company, the beneficiary of said grant, is not before the court.

The said defendants, further answering, say that the first knowledge that any of these defendants ever had of the
37 claim of the said Michael Donovan was the bringing of a suit by him in the District Court of Minnesota against Thomas Thomson, in regard to the possession and ownership of this tract of land. That said action was brought by the said Michael Donovan against Thomas Thomson, in the District Court of Minnesota, a court of competent jurisdiction, and which had jurisdiction of the parties, and subject matter. That said suit was brought in January, 1886. That the declaration therein made was that the said Donovan had been in the possession of the said premises for a long time prior thereto, and was entitled to such possession and occupation. That he made improvements thereon, and settled upon the land in 1867, and further alleged that in April, 1885, the defendant, Thomas Thomson, unlawfully entered upon said premises, and still unlawfully holds possession thereof, and gives out and claims that he has purchased the same to plaintiff's great damage, and prayed judgment for the possession of said premises, and that damages should be awarded to him by said court. This defendant, Thomson, appeared and answered said suit, alleged his right and title thereto under the said cotnract so as aforesaid given to the said Boyesen, and that he was entitled to the possession thereof. The issue so joined was tried in the said District Court in the County of Faribault, State of Wisconsin, and a judgment rendered in favor of defendant Thomson, and it is claimed and insisted by these defendants that said judgment is a complete bar to any right, title or interest of the said Donovan in the said premises.

38 And these defendants, further answering the allegations in said bill of complaint that said grant was unadjusted at the time of the passage of the Act of Congress approved March 3rd, 1887, referred to in said bill, say that said land grant was adjusted in the usual manner of adjusting

such grants, and within five years after the passage of the Act making said grant. That adjustments of land grants are matters in charge of the Land Department of the government, and that all adjustments are made by the Commissioner of the General Land Office and his subordinates, and in his office. That adjustments of land grants are made in said offices by the officers employed therein by an examination and determination as to each particular section or government subdivision of said grant on inspection of the map of [definate] location. That there is no such thing known to the law or practice of said department as the adjustment of any particular land grant as an entirety, but that the adjustments take place in regard to each specific section or government subdivision of the lands in such grant separately and that when an adjustment of any section or government subdivision has been decided upon, the adjustment as to that section or government subdivision is completed and finished. That no lands were ever certified or conveyed by the government to the State under any such land grant, until such adjustment as to the land so certified or conveyed had been made and completed. That such certifications or conveyances by the United States to the State in pursuance of such grants follow the adjustments made by the General Land Office, and never precede them and are made at different times. That after such conveyance or certification by the United States of any particular section
39 or government subdivision of lands in any land grant to the State to which it is granted neither the Commissioner of the General Land Office, or any other officer of the government has any further power or control in regard to it, and cannot thereafter make any additional or further adjustment or re-adjustment in regard to such lands. That such adjustment as to land in question was made by the General Land Office, prior to the certification thereof by the Secretary of the Interior to the State of Minnesota and prior to the 29th day of November, 1870. That it was selected as a part of the indemnity lands of said grant and in pursuance of such selection was subsequently, and on the 25th day of March, 1871, certified to the State of Minnesota. But there are no records or books kept in the office of the Commissioner of the General Land Office other than those showing the adjustment of the said sections or government subdivisions of land, as above described, and that there is no such thing known at the General Land Office as a general adjustment of the lands in any other manner than above specified relating to each particular piece or parcel of said land, and that there are no books showing there has been a general adjustment of any land grant, or specifying a time when it took place, but all the land grants made by the Congress of the United States, including

the grant in 1850 to the Illinois Central Railroad, still remain without any other record in regard to the adjustment thereof than such as is above stated, and it is not probable that any such books will ever be opened. These defendants therefore deny that this grant was unadjusted.

40 And these defendants further answering say that the east half of the northwest quarter of Section 35, Township 101, North, Range, 28, West, 5th P. M. Minnesota, is within the indemnity limits of said grant so as aforesaid made to the State of Minnesota. That on the 29th day of November, 1870, it was a part and parcel of the public lands of the United States within said indemnity limits, subject to entry by any person entitled to enter public lands, and to selection by said Southern Minnesota Railroad Company, as lieu lands in the place of lands sold or otherwise disposed of at the time of making said grant in the same manner as all the other unoccupied lands in said indemnity limits and in no manner distinguished therefrom. That there was nothing to show that said land was not subject to selection for the purposes of such indemnity. That by the uniform practice of the Land Department in all cases prior to said selection, and subsequent to the present time it had been the uniform course and practice of the government to hold such land upon which an entry had been made and subsequently cancelled subject to such selection, and in pursuance of that uniform course and practice of the Department the Land Office recognized the selection so made, and the same was in pursuance thereof, certified to the State of Minnesota under said grant, and subsequently conveyed by said State to the said Southern Minnesota Railroad Company, and by said Company in good faith conveyed to the present holders of said grant, who have ever since been in the actual and peaceful possession thereof. The commissioner of the general land office in his opinion in this case recognizes this practice as prevailing in his department
41 in 1889 and the Secretary of the Interior makes no objection but recognizes this rule in the same case.

And these defendants further answering deny, all and singular, the claim of the said Michael Donovan to the said lands, or any portion thereof, and further say that if he ever had any claim, right or interest therein, that the same is barred by the statute of limitations, and that it is stale and should not be enforced in a court of equity, and cannot be enforced by complainant for Donovan's benefit. That the Southern Minnesota Railroad Company acquired title to said land more than twenty years prior to the commencement of this suit, and any

claim that said Michael Donovan might have had, or now has to said lands is barred by the Statute of the State of Minnesota, and is stale and should not be enforced in this Honorable Court.

And these defendants further answering say that at the time this land was selected by the said Southern Minnesota Railroad Company under its grant there was nothing in the records of the Land Office showing any claim thereon; that it was selected in good faith and according to the rules and practice of the Land Department in that regard; that similar grants to railroad and other parties have been made by the government for fifty years last past, and have been administered under the rules and regulations as established by the Commissioner of the General Land Office, and during all that time it has been the uniform practice of said department in selecting lands in indemnity limits to allow the bene-
42 ficiary to select any and all lands in said limits upon which there appeared no claim upon the records of said office at the time of selection. And that in regard to such lands as had been theretofore entered as pre-emption or homestead lands, and subsequently cancelled in said limits, it has been the uniform practice of the department to allow lands which had been so entered for homestead or by pre-emption, or other like claims, and afterwards cancelled to be selected as a part of the land grants whenever desired by the company after the cancellation of such claims and the restoration of the said tracts to the public lands. That this rule was applied in this case, not only at the time of the origianl selection and certification of the land in question, but afterwards in 1889. When application was made in this particular case under the said laws of 1887, the Commissioner of the General Land Office in referring to the matter in his opinion of February 14th, 1889, says:

"No claim for the land (this land) appeared upon the official records when it was selected and certified for railroad purposes."

That said decision was taken to the Secretary of the Interior, and although reversed on another point, he states the rule of the department in such cases as follows:

"The tract in dispute was excepted from the withdrawal for the benefit of said grant by reason of the entry of Barclay, and after the cancellation of his entry, the tract became subject to selection by the road, or to entry under the homestead and pre-emption laws by the first legal applicant." That the government, in all its departments until the present time, had approved the

right of such selection, and that during the last 50 years
43 an immense number of people have acquired, as they supposed, title to lands for their homesteads selected under such circumstances, and that the rule now contended for, if applied in such cases, will deprive them of their homes and property, which have been acquired in conformity to all the rules and regulations of the government prescribed and adopted in the administration and management of such grants. And these defendants protest that it is beneath the dignity and honor of this great government, even if it has the power to deprive citizens of their homes and possessions on a technicality of this description, where they have complied with the strict rules established by the government, and followed by them in the administration of such grants. That individuals would not be allowed thus to disregard their own rules and settled practice to deprive parties dealing with them of their rights and property, and it is most respectfully submitted, that the government of the United States should not be allowed to ignore its own action for a series of years, and thereby defraud those who have dealt with it, or its grantees, strictly in pursuance of the rules established by it for the government and administration of such affairs, and these defendants further submit that the rights of the defendants in regard to this piece of land, obtained in good faith, in strict conformity with the rules and regulations of the United States, in such cases made and provided cannot be disregarded or set aside by the complainant. That as to these defendants and their grantees and all other purchasers of said land in good faith, the said complainant is estopped to set up or
44 claim that said land was not properly conveyed by it to said Southern Minnesota Railroad Company, or to deny or disregard its rules and practice under said land grant in adjusting said grant or to deny that said land was legally conveyed to the grantor of these defendants. That there was no claim or cloud upon the title of said property at the time it was selected by their grantor under the grant, and that they are protected in their rights under the Registry laws, and the records of the Land Department as purchasers in good faith.

And these defendants deny all unlawful combination and confederacy in the said bill charged; without this that any other matter or thing material or necessary for these defendants to make answer unto, and not herein or hereby well or sufficiently answered unto, confessed or avoided, traversed or denied, is true to the knowledge and belief of these defendants. All which matters and things these defendants are ready to aver, maintain and prove; as this honorable court shall direct;

and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

JOHN R. CAREY,
Solicitor of Counsel for Defendants.

45 United States of America,
Eastern District of Wisconsin—ss.

H. G. Haugan, being duly sworn, deposes and says, that he is Land Commissioner of the defendant, Chicago, Milwaukee & St. Paul Railway Company, and has charge of the land matters of said Company, and is acquainted therewith; that he has personal knowledge of a great part of the matters stated in the foregoing answer relating to the Southern Minnesota Railway Company, and further, this deponent says he has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

H. C. HAUGAN.

Subscribed and sworn to before me this 8th day of August, 1894.

[Notarial Seal] CHAS. A. PADLEY,
Notary Public, Milwaukee County, Wis.

46 Schedule "A."

This Agreement, Made this fifth day of January, in the year 1885, between the Southern Minnesota Railway Company, of the first part, and A. Boysen, of Milwaukee, County of Milwaukee, State of Wisconsin, of the second part, Witnesseth, that in consideration of the stipulations herein contained and the payments to be made as hereinafter specified, the first party hereby agrees to sell unto the second party the east half of the northwest quarter of Section No. Thirty-five (35), in Township No. One Hundred and One (101) North, of Range No. Twenty-Eight (28) west of the 5th Principal Meridian, being in Faribault County, State of Minnesota, containing, according to the United States survey, eighty acres, be the same more or less, for the sum of Four Hundred and Eighty Dollars, on which the said second party hath paid the sum of Ninety-four and eighty-seven one-hundredths dollars, together being Eighty Dollars, principal, and interest in advance, to August 18, 1885, at 6 per cent. per annum. And the said second party, in consideration of the premises, hereby agrees to pay to the said first party at the Land Office of said

Company, in Milwaukee, Wisconsin, the following sums of Principal and Interest, at several times named below:

	Day.	Month.	Year.	Principal.	Int.	Amount.
First Payment.....	18th	August	1885	$80.00	$19.20	$99.20
Second do	18th	August	1886	80.00	14.40	94.40
Third do	18th	August	1887	80.00	9.60	89.60
Fourth do	18th	August	1888	80.00	4.80	84.80
Fifth do	18th	August	1889	80.00		80.00

And it being mutually understood that the above premises are sold to said second party for improvement and cultivation, and said second party hereby further agrees and obligates himself, his heirs and assigns, that all improvements placed upon said premises shall remain thereon, and shall not be removed or destroyed until final payment for said land; and further
47 that he will punctually pay said sums of money above specified, as each of the same become due; and that he will regularly and seasonably pay all such taxes and assessments as may be lawfully imposed upon said premises.

In case the said second party, his legal representatives or his assigns shall pay the several sums of money aforesaid punctually, and at the several times above limited, and shall strictly and literally perform all and singular his agreements and stipulations aforesaid, after their true tenor and intent, then the first party will make unto the said second party, his heirs or assigns, (upon request) at the Land Office of the first party, in Milwaukee, Wisconsin, and the surrender of this contract) a Deed conveying said premises in a fee simple, with the ordinary covenants of warranty as to the title at the date of this contract and against any encumbrance placed thereon by the first party between said last date and the date of the Deed, excepting and reserving, however, unto the said party of the first part, its successors and assigns, the right-of-way one hundred feet in width, where the lines of its railway or any of its branches have been constructed over and upon said land, and excepting taxes for 1884.

But in case the second party shall fail to make the payments aforesaid, or any of them, punctually and upon the strict terms and times above limited, or to perform and complete all and each of his agreements and stipulations aforesaid, strictly and literally without any failure or default, the times of the payment being of the essence of this contract, then the first party shall have the right to declare this contract null and void and all the rights and interests hereby created or
48 then existing in favor of said second party, or derived under this Contract shall utterly cease and determine, and the premises hereby contracted shall revert to and revest in said first party (without any declaration of forfeiture, or

act, or re-entry, or without any other act by said first party to be performed, and without any right of said second party for reclamation or compensation for moneys paid or improvements made), as absolutely, fully and perfectly as if this Contract had never been made, which said moneys paid and improvements made are hereby declared to belong to said party of the first part as rents for the use and occupation previously had of said premises by the party of the second part. If, however, the said first party shall elect not to declare this Contract null and void in case the second party shall fail to make the payments, or any of them as above stipulated, the second party agrees to pay interest at the rate of ten per cent, per annum, annually, on all payments of both principal and interest from the date of their maturity.

And it is further mutually covenanted and agreed, by and between the parties hereto, that in case of default in the payments stipulated to be made by the said party of the second part, or any part thereof, and the election of the party of the first part, its representatives or assigns, to consider the foregoing contract of sale at an end, and prior payments forfeited, the said party of the second part, his heirs, representatives or assigns, who may have possession or the right of possession of said premises at the time of such default, or at any time thereafter, shall be considered, and are hereby agreed and declared to be in law and equity, the tenant or tenants
49 at will of the said party of the first part, its representatives and assigns, on a rent equal to an interest of ten per cent per annum, on the whole amount of the purchase money above specified, payable quarter yearly, from the day of such default in payment of principal or interest. And after such default in payment, and election to consider the above contract of sale void, the said party of the first part, its representatives and assigns, shall and may have and exercise all the powers, rights and remedies provided by law or equity, to collect such rent, or to remove such tenant or tenants, the same as if the relation of landlord and tenant, hereby declared, were created by an original absolute lease, for that purpose, on a specified rent, payable quarterly, on a tenure at will. And that in such case the said tenant or tenants shall and will pay, or cause to be paid all taxes and assessments, ordinary and extraordinary, which may be levied or assessed on said premises, or any part thereof, during the continuance of such tenancy; and will not commit or suffer any waste or damage to said premises, or the appurtenances, but will keep and deliver up, on the termination of such tenancy, the said premises and appurtenances in as good order and repair (ordinary wear or decay, and unavoidable injury by the elements excepted), as they were in at the commencement of such tenancy.

And it is further stipulated that no assignment of the premises shall be valid unless the same shall be indorsed hereon, or permanently attached hereto, and countersigned by the Land Commissioner of the Company (for which purpose this contract must be sent to the office of the Company, by mail
50 or otherwise), and that no agreement or conditions, or relations beween the second party and his assignee, or any other person acquiring title or interest from or through him shall preclude the first party from the right to convey the premises to said second party or his assigns, on the surrender of this agreement and the payment of the unpaid portion of the purchase money which may be due to the first party.

In witness of which, the Southern Minnesota Railway Company hath caused these presents in duplicate, to be executed by its Land Commissioner, and the second party hath hereunto set his name on the day and year first above written.

H. G. HAUGAN,
Land Commissioner.
A. BOYSEN,
Purchaser.

Witness:
H. C. Goetz,
C. K. Jackwitz.

I, Tom Tomson and Malena Tomson, his wife, the within named purchaser, for and in consideration of one (1) dollar, do hereby assign and transfer all my right, title, interest and claim in and to the within contract, and the premises therein described, unto O. C. Erichsrud, of Blue Earth City, in the County of Faribault, and State of Minnesota, and to his heirs and assigns forever. And I do hereby authorize the Chicago, Milwaukee & St. Paul Railway Company, to receive from the said O. C. Erichsrud all unpaid balances for said land,
51 and upon the final payment of all purchase money and a full compliance with all the requirements contained in the within agreements, to execute, or cause to be executed to the said O. C. Erichsrud, or his heirs and assigns, a deed for said lands instead of to me.

It is expressly understood that in consenting to recognize this assignment, the officers of this company do not exempt the original purchaser from any of his liabilities under the Contract, but to protect the rights of the assignee, provided he complies with its obligations, and under no circumstances whatever will any assignment of this Contract be considered valid, unless countersigned by the Land Commissioner of this

Company, for which purpose it must be sent to the office of the Company, within twenty days after such assignment.

Given under my hand, this third day of February, A. D. 1888.

TOM (X) TOMSON, [Seal]
MALENA (X) TOMSON, [Seal]

Witness:
John F. Clark,
John K. Johnson.

52 State of Minnesota,
Faribault County—ss.

Before me, F. P. Brown, a Notary Public, in and for said County, this day personally came Tom Tomson and Malena Tomson, his wife, personally known to me to be the identical persons described in the within agreement, and who executed the foregoing assignment, and acknowledged that they signed and delivered the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand this third day of February, A. D. 1888.
[Seal] F. P. BROWN,
Notary Public.

Assignment.

I, N. C. Frederiksen and Ada M. Frederiksen, his wife, the within named purchaser, for and in consideration of five dollars, do hereby assign and transfer all our rights, title, interest and claim in and to the within contract, and the premises therein described, unto Tom Tomson, of Elmore, in the County of Faribault and State of Minnesota, his heirs and assigns forever. And I do hereby authorize the Southern Minnesota Railway Extension Company, to receive from the said Tom Tomson all unpaid balances for said land, and upon the final payment of all purchase money and a full compliance with all the requirements contained in the within agreement, to execute, or cause to be executed, to the said Tom Tomson, his heirs and assigns, a deed for said lands instead of to me.

It is expressly understood that in consenting to recognize this assignment, the officers of this Company do not exempt the original purchaser from any of his liabilities under
53 the Contract, but to protect the rights of the assignee, provided he complies with its obligations, and under no circumstances whatever will any assignment of this Contract be considered valid, unless countersigned by the Land Commissioner of this Company, for which purpose it must be

sent to the office of the company, within twenty days after such assignment.

Given under my hand this first day of April, A. D. 1885.

N. C. FREDERIKSEN,
ADA M. FREDERIKSEN.
By W. H. Morris,
Her Attorney in fact.

Countersigned:
H. O. Haugan,
Land Commissioner.

State of Wisconsin,
Milwaukee County—ss.

Before me, G. E. Weiss, a Notary Public, in and for said County, this day personally came N. C. Frederiksen, and William H. Morris, the attorney in fact of the above named Ada M. Frederiksen, who is personally known to me be the identical persons who executed the foregoing assignment, and acknowledged that they signed and delivered the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand this 28th day of April, A. D. 1886.
[Seal] G. E. WEISS,
Notary Public, Milwaukee County, Wis.

Witness:
H. C. Goetz,
C. P. Egholm.

54 Assignment.

I, A. Boysen the within named purchaser, for and in consideration of two dollars, do hereby assign and transfer all my right, interest and claim in and to the within contract, and the premises therein described, unto N. C. Frederiksen of Chicago, in the County of Cook, and State of Illinois, his heirs and assigns forever. And I do hereby authorize the Southern Minnesota Railway Company to receive from the said N. C. Frederiksen all unpaid balances for said land, and upon the final payment of all purchase money and a full compliance with all the requirements contained in the within agreements, to execute, or cause to be executed, to the said N. C. Frederiksen his heirs and assigns, a deed for said lands instead of to me.

It is expressly understood that in consenting to recognize this assignment, the officers of this Company do not exempt the original purchaser from any of his liabilities under the Contract, but to protect the rights of the assignee, provided

he complies with its obligations, and under no circumstances whatever will any assignment of this contract be considered valid, unless countersigned by the Land Commissioner of this Company, for which purpose it must be sent to the office of the Company within twenty days after such assignment.
Given under my hand, this sixth day of January, A. D. 1885.

A. BOYSEN.

Countersigned,
H. G. Haugan,
Land Commissioner.

55 State of Wisconsin,
Milwaukee County—ss.

Before me, G. E. Weiss, a notary public in and for said County, this day personally came A. Boyesen, who is personally known to me to be the identical person who is described in the within agreement, and who executed the foregoing assignment, and acknowledged that he signed and delivered the same as his free and voluntary act and deed for the uses and purposes therein set forth.
Given under my hand this 10th day of January, A. D. 1885.

[Notarial seal] G. E. WEISS,
Notary Public.

Witness:
H. C. Goetz,
C. R. Jackwitz.

Indorsed: Joint and several answer of the Chicago, Milwaukee & St. Paul Railway Company, and the Southern Minnesota Railway Co. Filed August 11th, 1894. Oscar B. Hillis, Cierk. By Stephen Thorne, Deputy.

And on the 6th of March, 1901, the following Answer of Michael Donovan was filed of record in said cause to wit:

56 Circuit Court of the United States, for the District of Minnesota, Third Division.

The United States of America,
vs.
Chicago, Milwaukee & St. Paul Railway Company, The Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thomson, and O. C. Erichsrud.

The answer of the defendant, Michael Donovan, to the bill of complaint in the above entitled action.

The defendant, Michael Donovan, for answer to said bill of Complaint or to so much thereof as he is advised it is necessary or material for him to answer says:

(1) That he is and at all time hereinafter mentioned was a citizen of the United States and duly qualified to acquire a homestead on the Government lands pursuant to the homestead laws of the United States.

(2) That he served in the late Civil War on the union side in a Wisconsin Regiment for three years.

57 (3) That in the spring of 1867 he came to Minnesota for the purpose of selecting a quarter section of land and settling upon the same and acquiring title thereto under the homestead laws of the United States, and went to the United States Local Land Office at Winnebago City to ascertain what lands of the Government were subject to be so entered, and that he learned that the E. ½ of the N. W. ¼, Section 35, Town 101 N., Range 28 West, and the adjoining east half of the southwest quarter in Section 26, same Town and Range were subject to entry under said homestead laws, although one Luman Barkley had entered the same but had adandoned his entry for more than six months and had left the country and had written back that he should not return to claim the land and that it might be taken by any one else. That this defendant thereupon went and examined the land and being satisfied with it, settled upon it and erected a house on the tract in Section 26 and commenced cultivating both tracts in the year 1867, and in July of that year applied at the proper Local Land Office to enter the same under said homestead laws. That he was informed by said Local Land officers that he could not enter the same until the entry of Barkley was canceled, and that they would immediately take steps to have the same canceled. That he made out a formal written application to enter said tracts of land leaving the date of the same blank to be filled in when he should apply after said Barkley entry was canceled, and that he paid to said Local officers $15.00 being the price of said land and their fees and commissions, and left said written application to enter with them. That said Barkley application to enter said lands was canceled January 14th, 1868.

58 (4) That on the 6th of June, 1868, he again applied to said Local Land officers at their office to enter said lands and to fill the blank date in his previous application and to make the required affidavit, but was then informed by said Local Land officers that said land was within the limits of the grant by the United States to the State of Minnesota to aid in the construction of the Southern Minnesota Railroad, that is, that the tract in Section 35 was within the limits of said grant and could not be entered, but that he could enter the said tract in Section 26, and said officers refunded to him $2.00 of the

money he had previously paid them and no more. That he was informed by some other party that said tract in Section 35 was within the indemnity limits of said Railroad grant and had not been selected by said Company, and that if he held on to it he would ultimately get it. That accordingly, under the advice of said Land officers he entered said tract in Section 26, but continued in the possession, occupancy and cultivation of both of said tracts from that time for more than five years and until in 1885 when he was forcibly excluded from the possession and cultivation of said tract in Section 35 as hereinafter stated.

(5) That he had under plow and in crop about one acre of said land in said Section 35 in 1868, and increased the same to seven acres and had some forty acres of said tract under fence and continued to raise crops and pasture the same every year in connection with his cultivation of said tract in Section 26 for more than five years, and also constructed a drain or ditch through said tract in Section 35 to drain off water.

59 (6) That in 1875, after he had been so in the possession, occupancy and cultivation of said tracts of land for five years, he applied to said Local Land office to make final proof in respect to said tract in Section 26, and made said proof, and acquired a patent for said tract in Section 26 under said homestead laws. That at the time of making said proof in respect to said tract in said Section 26, he also offered to prove his occupancy and cultivation of said tract in said Section 35, and to embrace in his affidavit the requirements of the law in respect thereto and to pay the required fees and commission, but that said Local Land officers refused to take down said proof, or to embrace said tract in his affidavit upon the ground that said tract was not within his entry, but that his application to enter the same has been rejected and that said tract had been certified to the State as appertaining to the grant for said Southern Minnesota railroad; but that this defendant continued in the possession, occupancy and cultivation of said tract in said Section 35 until in 1885, as hereinafter stated.

(7) Further answering, this defendant states on information and belief that said Railroad Company assumed to select said tract of land in said Section 35 in November, 1870 and not before, and that the same was certified to the State for said Company in March, 1871, and was conveyed by the state to said Company in 1872, during all of which time this defendant was in the actual possession, occupancy and cultivation of said tract.

(8) And this defendant further answering, on information and belief states that the said Railroad Company on
60 January 5th, 1885, contracted in writing with one A. Boysen to sell to him said tract of land for $480.00 mostly on time of annual installments; and on the next day that the said Boysen sold and assigned said contract to one N. C. Frederickson, and that in April of the same year, the said Frederickson sold and assigned said contract to the defendant Thomas Thomson, all of whom took said contract while this defendant was in the possession, occupancy and cultivation of said tract and with notice of his equitable rights thereto.

(9) That after the said defendant Thomson became possessed of said contract, he forcibly took possession of said tract of land and excluded this defendant therefrom, claiming that he had a right to the same under said contract, and that he continued to cultivate so much of said land as this defendant had prepared for cultivation and excluded this defendant therefrom, except that he allowed this defendant to keep open and use the said drain or ditch through the same, until in 1888 when he sold and assigned said contract to the defendant, O. C. Erichsrud who thereupon paid the balance due on the said contract and procured a conveyance to himself for said tract from the defendant, the Southern Minnesota Railway Company, which Company claimed to have succeeded to the rights of the said Southern Minnesota Railroad Company.

(10) And this defendant, on information and belief, alleges that the said Erichsrud took said contract from said Thomson in order to secure payment of an indebtedness from said Thomson to him, and with full knowledge and notice of the equitable rights and claim of this defendant to said tract.

(11) That by some arrangement between the said
61 Erichsrud and the said Thomson, the latter continued in the occupancy and cultivation of said land for two or three years after the said Erichrud acquired a conveyance of the same, but never resided upon the same or erected any buildings thereon, and after having so occupied the same under said arrangement with the said Erichsrud for two or three years, he abandoned the same, since which time said tract has not been occupied or cultivated by any one except by this defendant in keeping open and in use said ditch or drain through the same.

(12) That since the commencement of this action, the said O. C. Erichsrud has departed this life intestate, leaving a widow and three children, his only heirs at law, and that in the year 1899, the said widow and heirs of the said O. C. Erichsrud

joined in a deed conveying said tract of land to one Louis K. Woodwick. But this defendant alleges on information and belief that the said Woodwick was not a bona fide purchaser of the same, but took such conveyance in trust for the said widow and heirs of the said Erichsrud, and with full notice and knowledge of the equitable rights and claims of this defendant to said tract.

(13) And this defendant further alleges that in June, 1883, he duly applied to the proper Local Land Office to enter said tract of land in said Section 35 under the Act of March 3rd, 1879, as additional to his final entry of said tract in said section 26. That his said application was refused by said Local Land officers whereupon he appealed to the Commissioner of the General Land Office, where said matter is still pending and undetermined.

62 (14) And this defendant further answering, alleges that in February, 1888, he duly applied to the General Land Office at Washington City, under the Act of Congress of March 3rd, 1887, to have his said application to enter said tract of land in said Section 35 made June 6, 1868, allowed and reinstated and for proper proceedings to be taken by the United States to recover back the title to said land. That said petition and application of this defendant and the matters connected therewith were taken by appeal to the Secretary of the Interior, who on April 1st, 1889, decided that the said aplication of this defendant to enter said tract of land June 6th, 1868, was erroneously rejected and that said tract of land was erroneously certified to the State for said Southern Minnesota Railroad Company, and that the petition of this defendant to have his said application to enter said tract allowed and reinstated and that proceedings by the United States to recover back the title to said land should be allowed, and the said Secretary instructed the Commissioner of the General Land Office to demand from said Railway Companies a reconveyance of the title to said tract of land, and if such demand was refused, to return the papers to his department to be submitted to the Attorney General for the purpose of instituting proceedings to recover back the title to said land under said Act of March 3rd, 1887. That the said Commissioner in pursuance thereof made such demand for the reconveyance of the title to said land, which was refused, whereupon, the said Commissioner returned the papers to the said Secretary of the Interior informing him of his action in the premises and of the refusal of said companies to reconvey the title to said land; whereupon, the said Secretary of the In-

terior transmitted the papers in said matter to the At-
63 torney General with a request that proper proceedings be instituted to recover back the title to said tract of land pursuant to said Act of Congress of March 3rd, 1887; whereupon, the present suit was instituted for that purpose.

(15) And this defendant alleges that said tract of land in said Section 35 is of the value of more than $2,000.00.

(16) Wherefore, this defendant prays that a decree be granted as prayed for in the bill in said action, and that the said conveyance of said tract of land to the said Louis K. Woodwick be declared canceled, null and void, and held for naught, and for such other and further relief as may seem proper in the premises.

MICHAEL DONOVAN.

J. M. GILMAN,
Solicitor & Counsel.

Filed March 6th, 1901. Henry D. Lang, Clerk. By Louise B. Trott, Deputy.

And on May 2d, 1901, the following answer of the Erichsruds and Louis W. Woodwick was filed of record in said cause to wit:

64 In the Circuit Court of the United States for the District of Minnesota, Third Division.

The United States of America,
vs.
The Chicago, Milwaukee & St. Paul Railway Company, The Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thomson, O. C. Erichsrud, Anna Erichsrud, Addie J. Erichsrud, Mabelle H. Anderson (formerly) Erichsrud, Julia P. Remington (formerly) Erichsrud, and Louis K. Woodwick, Defendants.

The joint and several answers of the defendants, Anna Erichsurd, Addie J. Erichsrud, Mabelle H. Anderson (formerly) Erichsrud, Julia P. Remington (formerly) Erichsrud, and Louis K. Woodwick, herein, to the bill of complaint and supplemental bill of the United States of America against these defendants and others.

These defendants now and at all times hereafter sav-
65 ing and reserving to themselves all manner and benefit and advantage of exception to the many errors and insufficiencies in the plaintiffs said bills of complaint contained, for answer thereto, or unto so much and such parts thereof—as these defendants are advised is material for them to make answer unto, they answer and say:

1st.

They admit the defendant O. C. Erichsrud has departed this life as alleged in said bills of complaint, and they admit that the above named defendants Anna Erichsrud, his widow, and the defendants Addie J. Erichsrud, Mabelle H. Anderson (formerly) Erichsrud, and Julia P. Remington (formerly) Erichsrud, were and are his sole heirs at law, and that said O. C. Erichsrud died intestate.

2nd.

They admit that on the 24th day of May, 1899, these answering defendants Erichsrud joined in a conveyance of the lands described in the bill of complaint, to wit: The East ½ of the Northwest ¼ of Section 35 in Township 101 North of Range No. 28 West in the County of Faribault, State of Minnesota, to the defendant, Louis K. Woodwick. They deny that the said deed of conveyance was made by them, or was received by the defendant Woodwick, at the request of or for the accommodation of the defendants Erichsrud or either of them here answering; or that the same was made or received in trust for them or either of them as alleged in said supplemental bill or otherwise; and these defendants allege in that behalf, that the said deed to the defendant Woodwick was made in the usual course of business between buyer and seller of
66 real estate, and was made in good faith and for a valuable consideration moving from the defendant Woodwick to these answering defendants Erichsrud, to wit: The sum of Two Thousand Dollars in money paid by the defendant Woodwick to the said defendant Erichsrud, which said sum was the reasonable value and worth thereof.

3rd.

These defendants further answering admit that the defendant the Southern Minnesota Railway Company contracted to sell the lands herein described on or about the 5th day of January, 1885, to one A. Boyson, and that said Boyson afterwards with the consent of the said Railway Companies assigned the said contract to one N. C. Frederickson, and that said Frederickson afterwards with the consent of said Companies assigned the same to the defendant herein Thomson, and that afterwards the said Thompson assigned the same to the defendant O. C. Erichsrud in his life time, and that afterwards the said defendant O. C. Erichsrud in his life time paid to the said Companies or one of them the full sum and amount necessary under the terms of said contract to be paid, to wit all the then unpaid portion of the sum of Four Hundred and Eighty Dollars and of the interest thereon, and that on said payment so

made the said Southern Minnesota Railway Company defendant made and executed to the said defendant Erichsrud in his life a conveyance in fee simple of the said tract of land described and set forth and which is the subject of this action.

4th.

These defendants deny upon information and belief that the said defendant Erichsrud deceased took the assignment
67 of the said contract from the said Thompson for the purpose of securing the payment of an indebtedness due from said Thompson to him, or for any purpose other than as an absolute sale to him by said Thompson for all his interest in the said contract and premises described therein, and deny upon their information and belief that the said defendant Erichsrud deceased procured the making of the deed aforesaid by the defendant Railway Company of the said land to him for the purpose of securing the payment of any prior indebtedness due from said Thompson to him.

5th.

These defendants deny that the said defendant Erichsrud deceased took the assignment of said contract and the title to said land by the said conveyance as security for any pre-existing debt from said Thompson or that he ever held the same in trust for the said Thompson or for the benefit of the said Thompson or as a mortgage only; but these defendants aver upon their information and belief that the said assignment and the said conveyance so made whereby the title to said land became and was vested in the said Erichsrud in his life time were respectfully so taken and held as an absolute sale by said Thompson and an absolute purchase by said Erichsrud, in good faith and not otherwise, and that the same was so taken and held by the said Erichsrud without any knowledge or information that the title of the said defendant Southern Minnesota Railway Company, or of any person claiming through or under it, to said land, was in dispute that the certification thereof to the State of Minnesota for the bene-
68 fit of said Company was improper or without authority of law, whether as alleged in said bills of complaint or otherwise, and in reliance upon the action of the Government of the United States the plaintiff herein in the transfer of the title to said land by its certification thereof to the State of Minnesota.

6th.

Further answering these defendants allege and show to this Court, that at the decease of the defendant O. C. Erichsrud, he

was in the quiet and peaceable possession of the premises herein described, and was the legal owner of the same and all thereof, and that after his said decease his estate was duly administered under the authority and jurisdiction of the Probate Court of the County of Faribault, State of Minnesota, and in due course of such administration a final distributive decree and judgment was made and pronounced by the said Probate Court, wherein and whereby the real estate described herein was duly assigned to these defendants Erichsrud as the sole heirs at Law of the said defendant O. C. Erichsrud, deceased; which said decree was made on the 7th day of November, 1888 and was duly recorded in the Register of Deeds Office of the said County of Faribault on the 24th day of May, 1899, in Book 33 of Deeds on Page 33, and the same is now lawfully of record therein.

And the defendants Erichsrud answering herein aver that from the decease of the defendant O. C. Erichsrud until their sale and conveyance to the defendant Woodwick, they were the lawful owners of said tract of land and in the quiet
69 and peaceable possession thereof and of the whole thereof.

7th.

These defendants Erichsrud for themselves further allege that until served with the subpoena herein neither they nor either of them ever had any knowledge or information that the title of the said deceased defendant Erichrud was disputed or claimed by any other person as alleged in said complaint or otherwise, or of the pendency of this action, or of any claim of the defendant Donovan to said lands.

8th.

The defendant Woodwick further answering for himself denies that at the time of taking title to said lands from the defendants Erichsrud as herein alleged or at any other time before service of the subpoena herein he had any knowledge, information or notice of the pendency of this action or of any equitable right or claim of the defendant Donovan to the said land or of any infirmity in the title to said land by him acquired.

9th.

The defendant Woodwick further avers and alleges that he purchased the said land from the defendants Erichsrud in perfect good faith in ignorance of any defect in the title of the said Railway Companies or either of them to said tract of land, and in full reliance upon the action of the Government

of the United States the Plaintiff herein in the transfer of the title to said land by its certification thereof to the State of Minnesota, and further relying upon the title of said defendants Erichsrud to the said land as the same appeared
70 upon the records of the Register of Deeds' Office in the said County of Faribault, and further relying upon the quiet and peaceable possession of the same which the said defendant had enjoyed since the decease of the defendant O. C. Erichsrud; that he paid the defendants Erichsrud full value for the same and took the title thereto solely for his own personal benefit, and not in trust for the said widow and heirs of said deceased defendant Erichsrud or any of them.

Further answering all these defendants allege that as to all the other matters and things alleged in said plaintiffs bills of complaint, both original, amended and supplemental, and which are not herein otherwise answered unto, that they or any of them have no personal knowledge, and on their several information and belief, they severally adopt the joint and several answers of the defendants the Chicago, Milwaukee & St. Paul Railway Company and the Southern Minnesota Railway Company as interposed and filed by their solicitor John W. Cary, Esq., in printed form and they ask that the same be held and considered as a part of this their answer, except in the following parts and portions thereof to wit: The portion thereof commencing with the word "and" in the 26th line of the 11th page thereof, and ending with the word "defendants" in the 29th line of same page, being the words, to wit:

"And that as these defendants are informed and believe the assignment to O. C. Erichsrud was made by said Thompson for the purpose of securing money at that time borrowed of said Erichsrud to pay the balance due on said contract to
71 these defendants;" and also excepting the portion of said answers commencing with the word "and" at the end of the 14th line on the 12th page thereof, and ending with the word "contract" in the 17th line of said page 12, being the words as follows: "And as these defendants believe he holds the said lands for the said Thompson, and as a security for the money advanced by him for said Thompson in payment of the balance due on said contract;" and with the foregoing exceptions these defendants adopt the said answers as part and parcel of their answer to all of said bill of complaint and supplemental bill not herein otherwise answered unto.

These defendants further answering say that as to each and all other matters and things alleged in the said bills of complaint and which are material and necessary for them to

answer unto and which are not herein otherwise answered unto, that they deny the same and each and every thereof.

Wherefor- these defendants ask to be hence dismissed with their costs.

ANDREW C. DUNN,
Solicitor for Defendants, Anna Erichsrud, Addie J. Erichsrud, Mabelle H. Anderson nee Erichsrud, Julia P. Remington nee Erichsrud, and Louis K. Woodwick.

Filed May 2nd, 1901. Henry D. Lang, Clerk.

And on May 6th, 1901, the following Replication was filed of record in said cause, to wit:

72 Circuit Court of the United States, District of Minnesota, Third Division.

The United States of America, Complainant,
vs. In Equity.
The Chicago, Milwaukee & St. Paul Ry. Co., Southern Minnesota Ry. Co., Michael Donovan et al., Defendants.

The replication of the above named complainant to the joint and several and separate answers of Anna Erichsrud, Addie J. Erichsrud, Mabelle H. Anderson, Nee Erichsrud, Julia P. Remington, Nee Erichsrud, and Louis K. Woodwick.

This repliant saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of the said answers, and each and all thereof for replication thereunto, saith that it will aver and prove its said bill to be true, certain and sufficient in the law to be answered unto, and that the said answers of the said defendants are each and all uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answers contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant avers, and will be ready to aver and prove as this honorable court shall direct and humbly prays as in and by its said bill it has already prayed.

J. M. GILMAN,
Special Solicitor.

Indorsed: Filed May 6th, 1901. Henry D. Lang, Clerk. By Louise B. Trott, Deputy.

And on December 29th, 1897, the following replication was filed of record in said cause, to wit:

73 Circuit Court of the United States, District of Minnesota, Second Division.

The United States of America, Complainant,
vs. In Equity.
The Chicago, Milwaukee & St. Paul Railway Company, the Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thomson and O. C. Erichsrud, Defendants.

The replication of the United States of America, complainant, to the joint and several and separate answers of the defendants above named.

This repliant saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of the said answers, and each and all thereof for replication thereunto saith that it will aver and prove its said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendants, are each and all uncertain; untrue and insufficient to be replied unto by this repliant: without this, that any other matter or thing whatsoever in the said answers contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant avers, and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it has already prayed.

EDWARD C. STRINGER,
Solicitor for Complainant.

74 District of Minnesota,
Office of Clerk of
U. S. Circuit Court—ss.

Edward C. Stringer came before me personally and being first duly sworn says, that he is the United States Attorney for the District of Minnesota and solicitor for complainant in the above entitled case: that the foregoing pleading is true.

EDWARD C. STRINGER.

Subscribed and sworn before me this 21st day of December, A. D. 1897.

[Seal of Court] HENRY D. LANG,
Clerk, U. S. Circuit Court for the District of Minnesota.

It is hereby stipulated that the above replication may be filed in the above entitled case with the Clerk of said court.

BURTON HANSON &
W. H. NORRIS,
Solicitors for Answering Defendants.

Filed December 29th, 1897. Henry D. Lang, Celrk. By A. O. Eberhardt, Deputy.

And on April 1st, 1901, the following order appointing H. H. Horn, Special Examiner, was entered of record in said cause, to wit:

75 United States Circuit Court, District of Minnesota, Second Division.

United States of America, Complainant,
vs.
Chicago, Milwaukee & St. Paul Railway Co., Southern Minnesota Railway Company, Michael Donovan et als., Defendants.

Pursuant to the stipulation entered into between the respective Solicitors herein, it is hereby ordered that said H. Harcourt Horn, be and he is hereby appointed Special Examiner to take and report the testimony in this case, and return the same to this Court.

Dated March 30, 1901.

WM. LOCHREN, Judge.

Indorsed: Filed April 1st, 1901. Henry D. Lang, Clerk.

And on the same day the following oath of Special Examiner was filed of record in said cause, to wit:

75½ United States Circuit Court, District of Minnesota, Third Division.

United States of America, Complainant,
vs.
Chicago, Milwaukee & St. Paul Railway Company, Southern Minnesota Railway Company, Michael Donovan et al., Defendants.

I hereby solemnly swear that I will duly and faithfully perform the duties of Special Examiner in the above entitled cause to the best of my ability, and that I will uphold the Constitution of the United States.

H. HARCOURT HORN.

Subscribed and sworn to before me this 30th day of March, A. D. 1901.

[Seal of Court] HENRY D. LANG,
Clerk U. S. Circuit Court, District of Minnesota.

Indorsed: Oath of H. H. Horn, Special Examiner. Filed April 1st, 1901. Henry D. Lang, Clerk.

76 United States Circuit Court, District of Minnesota, Third Division.

United States, Complainant,

vs.

Chicago, Milwaukee & St. Paul Railway Company, Michael Donovan et als., Defendants.

Pursuant to notice, stipulation and order in the above entitled cause, the parties thereto met in the village of Winnebago City, Faribault County, Minnesota, and the solicitors on both sides being present, the following proceedings were had in the presence of the duly appointed Special Examiner, H. Harcourt Horn, of the city of St. Paul.

Robert G. Evans, Esq., United District Attorney, and John N. Gilman, Esq., Solicitors for Complainant.

W. H. Norris, Esq., and Andrew C. Dunn, for the Defendants, with the exception of Michael Donovan.

77 Adams H. Bullis, a witness of lawful age produced on the part of the complainant, being duly sworn, testifies as follows:

Examination-in-Chief

By Mr. Gilman:

Q. Were you Register of the United States Land Office in Winnebago City in 1867 and 1868? A. Yes, sir.

Q. I call your attention to an affidavit made by you at one time in connection with the land in controversy in this suit, marked "Exhibit A," and ask you whether that is your original signature? A. Yes, I think it is.

Q. In whose handwriting is the body of that affidavit, do you know? A. It looks like mine.

Q. You think it is yours?

A. I think it is mine, yes, that is my handwriting, I can say I made that affidavit.

Mr. Dunn: Now, that is not your handwriting, not the body of the instrument.

Q. But the signature is yours?

A. Yes, sir, the signature is mine.

Q. Are you acquainted with the Defendant, Michael Donovan? A. Yes, sir.

Q. Do you recollect of Michael Donovan applying to you as Resister of the Local Land Office, or to you and the Receiver in 1867, and also in 1868, to enter under the Homestead Laws of the United States the east half of the Northewest Quarter of Section 35, and the East half of the Southwest quarter of

Section 26, Township 101, Range 28, Faribault County, Minnesota, do you recollect of his applying for that land?

A. Yes, I recollect of his applying for the land.

78 Q. In 1867 and 1868? A. Yes, sir.

Q. I wish you would state what took place at the time of the first application in 1867? What month was it that he applied, do you recollect?

A. No, it was in the summer.

Q. In the summer, what month?

A. I should say, probably June.

Q. What took place at that time?

A. Well, when he applied for that land there was a homestead entry on the land, I think a soldier's homestead entry, as they called it then, I wouldn't be certain, but there was already a homestead entry on it.

Q. Do you recollect the party's name, one party?

A. No.

Q. Was it Barkley?

A. Yes, sir, I guess it was Barkley.

Q. Luman Barkley?

A. Yes, sir. That is a good while to remember back, you know. He applied for the land and, of course, there being an entry, he couldn't take it until the other entry was canceled, so we called, what we called, ordered a trial on it.

Q. What was that for? To have the Barkley entry canceled?

A. It was an application to prove non-residence of the homesteader, and that there had never been any one living on it. And the proof of that was sent to the Department and they canceled the entry on receipt of that proof.

Q. Do you recollect now when that was canceled?

A. No, I do not, it must have been probably nearly a year after, that was about the way they used to run.

Mr. Gilman: It was canceled the 14th of January, 1868, according to the pleadings, the records show that.

Q. What papers were made out at the time Mr. Dono-

79 van first made his application in 1867?

A. There would be a homestead, what we call a homestead affidavit. That was an affidavit of allegiance to the Government, and also an application to enter the land. It was filled out in blank.

Q. That is, you mean the date was left blank?

A. Yes, sir, the date was left blank.

Mr. Dunn: I would like to object to the witness giving any testimony as to the contents of a written paper, on the ground that it is not the best evidence.

Q. Was it signed by him? A. Yes, sir.

Q. It was all filled up in full to enter these tracts of land, except putting in the date of the application?

A. Yes, sir.

Q. Why was it, you say it was left with you as Register of the Local Land Office? A. Yes, sir.

Q. Why was that done?

A. Because the entry couldn't be made until we had notice of the cancellation of the prior entry. It was left with me so that if any other person came up after it was canceled, it would be Government Land, and that being left with me—

Q. It was to head off any other entry?

A. Yes, sir, to head off any other entry.

Q. To head off any other application? A. Yes, sir.

Q. After Barkley's entry was canceled? A. Yes, sir.

Q. As soon as Barkley's entry was canceled and you made his entry on the books of the application for the land, did he pay for the land and the fees incident at that time?

A. I think he did.

80 Q. What became of the application afterwards?

A. I don't know as I can tell you about that.

Q. When did he apply the second time?

A. He applied after the Barkley entry was canceled. He was notified that the Barkley entry was canceled.

Q. He applied then for what? A. To enter the land.

Q. To enter the land under the application which he had made and left with you a long time before?

A. Yes, sir, I presume we made a new application for the entry in that section when he applied.

Q. You had the application for the entry of the land that he had made before? A. Yes, sir.

Q. You had his application for that?

A. Yes, sir, we had his application for the whole land.

Q. For the whole land? A. Yes, sir.

Q. There remained nothing to add to it, except to put in the date of the application? A. That is all.

Q. This application was made when, do you think, what time in 1868?

A. Well, I couldn't tell you, it seems to me some time, I should think it was along in the spring or summer, but I don't recollect these things.

Q. In this affidavit, the date it was made was the 6th of June? A. Yes, probably that is right.

Q. When he applied to enter the two tracts, what was he informed then with reference to whether he could enter this tract on Section 35?

81 A. He was informed that we were instructed not to allow any entries on odd numbered Sections within a certain distance of the railroad.

Q. Was this Section 35 within twenty miles of the railroad, the Southern Minnesota railroad? A. I suppose it was.

Q. It was within the indemnity limits?

A. Yes, sir, within the indemnity limits.

Q. He was told he could not enter that tract because it belonged to the Railroad Company?

A. Yes, sir, that is what he was told.

Q. What was he told with reference to the other tract?

A. It was probable he could enter that, of course.

Q. Did he enter the tract in Section 26 then?

A. I think he did.

Q. Was this application which had been first made out, used, or was it destroyed and a new application made for the entry of the tract in Section 26?

A. I presume it was destroyed, and a new application made, but I couldn't tell you.

Q. That first application would cover both tracts, which was made out in 1867, under which he applied to enter the land in 1886,—You don't know what became of that?

A. No, I do not know; I presume it was destroyed. It was easier to fill out a new one than it was to erase the old one, you know.

Q. If there was a new application made for the tract of land in Section 26, if there was a new application made which embraced only that tract, you assume that a new application was made, because it was easier to do that than it was to erase the tract in Section 35? A. Yes.

82 Q. Who was the Receiver of the Land Office at that time? A. H. W. Holly.

Q. Is he living still? A. He is not.

Q. What relation did he sustain to the Southern Minnesota Ry. Co. at that time? A. He was Chief Engineer, I guess.

Q. Chief Engineer of the Southern Minnesota railroad?

A. Yes, I think so.

Q. This land was within the limits of a grant made by Congress to aid in the construction of the Southern Minnesota railroad, was it? A. Yes.

Q. It was within the indemnity limits? A. Yes.

Q. Was Mr. Holly watchful to secure all the lands he could for that Railroad Company? A. Well, I presume so.

Q. This land at that time had not been selected by the Railroad Company?

Objected to on the ground that the same is a matter of record.

A. No, sir, not until they filed a plat with us and we forwarded it to the Government, a plat where the railroad ran. Of course, when they reported it back the plat was there, and then the land was withdrawn.

Q. It was filed before you went in office there?

A. Oh, no, they filed two plats.

Q. This land grant was in July, 1866?

A. The first plat was not filed until I came into the office. They didn't file it until they got through the survey. They filed it after I came into the office.

83 Q. Do you know whether any one told Mr. Donovan at that time that if he held on to the land he could probably secure a title to it, as it had not been selected by the Railroad Company?

Counsel for Defendants objects to the question as immaterial.

A. I don't understand the question.

Q. Do you know whether any one told Mr. Donovan that he had a right to enter this land in Section 35, and if he held on to it he could secure a title to it, for the reason it had not been selected by the Railroad Company yet?

A. I don't know anything about any one telling him that. I don't know but I might have done it myself. That was my opinion, anyway, at the time.

Q. That it was subject to entry?

A. Yes, I claimed that if they carried those things out, they could get that land. I claimed that these homesteads never belonged to the Railroad Company, but they were prior grants.

Q. That is, you were of the opinion that the rights of the Railroad Company did not attach until the lands were selected? A. Yes. No, that is not.

Mr. Dunn: I do not think the opinion of the witness is a matter of evidence.

Witness: I might have done it and told Mr. Donovan, I having that opinion might have told him just what you said, I don't know about that.

Mr. Dunn: We object to this evidence as immaterial.

84 Q. Do you know, whether Mr. Donovan, at the time he applied to enter this land in 1867, had already located upon it, or was living upon it?

A. I don't know any more than what he told me. I was not on the land myself.

Mr. Dunn: We object to this.

Witness: He claimed to be living on it.

Mr. Dunn: I object to this as incompetent; as hearsay testimony.

Q. He claimed to be living on it?

A. Yes, sir. That was the way all these settlements were made.

Q. Do you know, as a fact that Mr. Donovan continued to live on this land that he entered in Section 26, and also held onto the land that he applied to enter in Section 35? Do you know that fact of your own knowledge? A. No, sir.

Q. How long did you continue in office?

A. I was in office until, I think, the 4th of March or April, 1869.

Q. Who succeeded you in the office?

A. Freeman, E. P. Freeman.

Q. Who was the Receiver?

A. The Receiver was Wakefield.

Q. Who succeeded Freeman when he died?

A. Well, the Land Office was consolidated. Mons Grinnager.

Cross-Examination

By Mr. Dunn:

Q. When did you first know Michael Donovan?

A. I knew him when he came to enter the land, I guess.

Q. When was that? A. 1867.

Q. What time in 1867?

A. I should think the summer of 1867.

Q. You say, you should think; have you any remembrance as to what time it was, at all, whether it was in 1867 or 1868?

A. I cannot remember back as far as that.

85 Q. Have you any remembrance whether it was 1867 or 1868?

A. I know it was 1867, from circumstances.

Q. From circumstances? A. Yes, sir.

Q. What circumstances do you refer to?

A. From the fact of the trial being ordered.

Q. Are you not in the habit of making entries of trials being ordered? A. Yes, sir.

Q. If there should be no entry in any of the books, of any trial being ordered for Mr. Donovan, you would be under a mistake.

A. No, sir, not necessarily, I wouldn't. It was put on a blotter and that might be thrown away at any time, it was not a Government record.

Q. Then there was no record made of any such trial being ordered?

A. There was a record made on a sort of a blotter that we kept for that purpose, of a trial being ordered for so and so at such and such a date, and coming up on another certain date.

Q. That trial came off, did it? A. Yes, sir.

Q. There would be a record of that trial, wouldn't there?

A. There should be a record of the trial. There should be a report of the trial sent on to the Government at Washington.

Q. Do you know whether there was any such trial?

A. There is no doubt there was.

Q. Do you remember there being a trial?

A. I remember Mr. Donovan coming there with his witnesses.

Q. You remember his coming there with his witnesses?

A. Yes, sir.

86 What time was it?

A. 1867, it was sometime in 1867.

Q. What time in 1867? I think you are all off. I have got the record and it does not show any report of the trial. I think you are all wrong upon the proposition of the trial.

A. No, I am all right upon it; I remember sure there was a trial.

Q. There was a report made by the Land Officers of that trial?

A. The evidence would be forwarded to Washington with a recommendation either to cancel or not to cancel.

Q. Was such a report forwarded? A. Yes, sir.

Q. Would not the records show if a trial was ordered upon the request of Mr. Donovan? A. It might not.

Q. Should it not so show? A. I guess not.

Q. Shouldn't the report show that some one initiated that trial?

A. I should think it would. Yes, I should think it would.

Q. Then the report, in your judgment, should show that Mr. Donovan initiated that trial?

A. Yes, I think it should, I couldn't tell you for certain.

Q. That was the usual custom, was it not?

A. I don't know just now, whether it was or not. Yes, sir, the evidence would be all sent on to Washington.

Q. It was not the custom to initiate a trial of your own motion?

A. No, sir, we didn't do that. We wouldn't do it unless Mr. Donovan asked for it, no sir.

Q. If Mr. Donovan ordered that trial, then the report in Washington should show that fact, shouldn't it?

A. Yes, sir I should think so.

Q. To be a proper report it should.

87 A. Yes, sir, I should think so.

Q. If there is no such report then there would be a doubt in your mind as to whether he ordered the trial, wouldn't there? A. No, sir, there would not.

Q. Your opinion would be the same? A. Yes, sir.

Q. And it would be the same whether you made a report or not? A. Yes, sir.

Q. He wouldn't be apt to be having a trial to cancel the entry of this land without your making a report?

A. We never canceled any entry without a trial.

Q. Did you cancel this entry? A. Yes, sir.

Q. You canceled it?

A. Well, it was canceled by the Department.

Q. When was it canceled?

A. That would be in the Department.

Mr. Gilman: I object to this.

Q. I am trying to test your memory.

A. It was canceled before the spring of 1868. These answers we got sometimes they would be two or three months, and sometimes a year before we got the notice of cancellation.

Q. Before you got the notice of cancellation from the Department at Washington? A. Yes, sir.

Q. Did you get a notice of cancellation? A. Yes, sir.

Q. Of this particular entry? A. Yes, sir.

Q. You did? A. Yes, sir.

Q. When did you get it? A. I couldn't tell you.

Q. You can't tell?

A. It would be more than I could do to give just the date at this time.

Q. What makes you think that you got a report of this particular entry? A. What makes me think so?

88 Q. Yes. What circumstance?

A. Because I notified Mr. Donovan that the entry was canceled.

Q. You notified him as soon as you got the report?

A. Soon after yes.

Q. How long after? A. I couldn't tell you that.

Q. You notified him as soon as the report came into the office that the entry was canceled, did you? A. Yes, sir.

Q. You notified Mr. Donovan? A. Yes, sir.

Q. Of that fact? A. Yes, sir.

Q. How long after that did he appear and apply for the land? A. I don't know.

Q. About how long? A. I don't know.

Q. You reported it about when you received it, didn't you?

A. I don't know what time it was.

Q. You notified him immediately?

A. That is the custom, yes, sir.
Q. That is the custom? A. Yes, sir.
Q. So you presume you did? A. I have no doubt I did.
Q. Do you know how long after that notification was made before he appeared? A. I couldn't tell you that.
Q. About how long?
A. I haven't the least idea. It might have been a month and it might have been three months.
Q. And it might have been three days? A. Yes, sir.
Q. How did you notify him, do you know?
A. By letter.
Q. Where was his postoffice, do you know?
A. I guess Blue Earth.
89 Q. Blue Earth City? A. Yes, sir.
Q. Is there any record of this letter that you wrote, this notification A. No.
Q. No record of it? A. No record of that.
Q. Was there any record kept of that first application you claim he made in 1867? A. No, sir.
Q. No record of it? A. No, sir.
Q. Was the application preserved?
A. The application was filed away probably with—
Q. Never mind about probably, I am not asking you about that.
I am asking you for your memory. I don't want probabilities, because that is ridiculous. Was the application preserved to your knowledge, that he made at that time?
A. It was preserved until—
Q. Was it preserved to your knowledge?
A. I don't understand this exactly. It was preserved until he came a second time.
Q. Then it was preserved, was it? Now I am going to ask you what became of it afterwards?
A. It was preserved for that time.
Q. For how long?
A. Until he came there himself and made the second entry.
Q. Do you know about how long that was?
A. No, I don't remember that.
Q. Was there any minute made, you keep what is called a plat book, do you not, in the office of the Land Office, you as Register keep what is called a plat book?
A. We had a plat book and we had also a tract book.
90 both. This, as a matter of fact, was kept in the tract book.
Q. You had a tract book? A. Yes, sir.
Q. On that tract book, didn't it appear that this piece of land in Section 35, had been homesteaded by one Luman Barkley?

A. These homesteaders didn't show on our tract books, and didn't show on our record books. There was never any entry upon the tract book until final proof, but we kept a record of all entries that were made.

Q. Isn't it a fact that your tract book should contain a history of each piece of land, as to what was done with it every time anything was done, isn't that a fact?

A. What we called our Homestead Entry book contained all these things, but not the tract book. The tract books were a different set of books.

Q. What is the object of the tract book?

A. The tract book was to keep track of the final sales of the land.

Q. Simply the final sales? A. Yes, sir.

Q. And nothing intermediate? A. No, sir.

Q. Nothing but the final sales? A. No, sir.

Q. What book did you have to keep track of the intermediate steps in?

A. Well, we had only the Homestead Entry book.

Q. The Homestead Entry book? A. Yes, sir.

Q. That was a book that was kept in the office, was it not?

A. Yes, sir.

Q. And that book should show the fact that this tract had been homesteaded by Luman Barkley, shouldn't it?

A. Yes, sir.

Q. And that book should show also the fact that Mr.
91 Donovan applied to enter that land, should it not?

A. No, sir.

Q. It shouldn't? A. No, sir, it wouldn't show it at all.

Q. Would that book show the cancellation of the Luman Barkley entry?

A. Probably not. It might and it might not.

Q. It might and it might not? A. Yes, sir.

Q. It would show who took the land up?

A. Probably, it might not, probably not.

Q. Then you had no record whereby any of these proceedings of Mr. Donovan could be preserved in your office, had you?

A. No, no more than his application and affidavit were filed and put in a pigeon hole.

Q. You claim now, as Register of the Land Office, that no records were kept of the application of Mr. Donovan, that was made in 1867, do you? A. There was nothing.

Q. There was nothing? A. No, sir.

Q. You are testifying entirely from memory upon that proposition, are you? A. Yes, sir.

Q. You know nothing at all what became of that so-called application that you claim was made there? A. No, sir.

Q. Do you know that it was destroyed? A. No, sir.

Q. You don't know but what it is kept, do you, until this day? A. Oh, I am sure it wouldn't be kept.

Q. You are sure it wouldn't be kept? A. Yes, sir.

Q. You don't know that, you don't know but it was kept?

A. It was usual for me to destroy those things, throw them on the floor.

Q. To destroy the application of a man who would come to buy land from the Government, throw it upon the floor? A. Yes, sir.

Q. Then when you threw it upon the floor, it was considered an abandoned application?

A. No, sir, it was no application at all.

Q. It was considered as having fulfilled its functions?

A. Yes, sir.

Q. As useless? A. Yes, sir, it was considered useless.

Q. And of no avail whatever? A. No, sir.

Q. When Mr. Donovan came there, as you say in 1857, where was the Land Office at that time? A. Where was it?

Q. Yes. A. It was down at the end of this street here.

Q. In this village? A. Yes, sir.

Q. Winnebago city? A. Yes, sir.

Q. Were you present when he first came in, or was Mr. Hadly? A. I was always present.

Q. You were always present? A. Yes, sir.

Q. Hadly was not always present?

A. Hadly, he was hardly ever an hour in the office during business hours.

Q. He wasn't much in the office?

A. He was away generally until sometime at the end of the month. You will remember I was doing the business for the Register and Receiver both.

Q. You did the business both of the Register and Receiver?

A. Yes, sir, he was off all the time upon railroad business.

Q. Not all the time?

A. He came in at times, enough to send the reports, etc.

Q. He was gone a great deal of the time, that is true?

A. He was gone all of the time nearly.

Q. Yes, he was away a good deal, I know that.

A. He was home the last of the month to make out his reports.

Q. Then when Mr. Hadly was gone, most of the business you attended to, you transacted most of the business of the office? A. Yes, sir.

Q. I think I remember you did the largest part of the work, that is true. Do you remember who, if any one, made the application, or wrote the application for Mr. Donovan, if one was made? A. I wrote it.

Q. Do you remember that distinctly, do you remember that you did, or do you just suppose you did?

A. Well, I have no doubt I did.

Q. You have a distinct remembrance of it? A. No, sir.

Q. Of that particular act? A. No, sir.

Q. Have you a particular and distinct remembrance of the contents of the paper?

A. Yes, I know what the contents of the paper would be.

Q. But have you a distinct remembrance of what the contents of the paper were?

A. I know about what the contents were.

Q. You know what they ought to be; but have you a distinct remembrance of what they were?

A. I have got a remembrance about that, because Mr. Donovan and I talked it over, and my memory has been renewed a good many times since it happened, you know.

Q. What I want to know is, have you any distinct remembrance of the contents and conditions of that paper?

A. I remember the description of the land, yes.

Q. What was the description of the land? Give it
94 to us if you remember it? A. I can't do it.

Q. Then you don't remember it, do you? Of course you don't? A. I don't remember that.

Q. Then you don't remember it, do you? Of course you don't. A. I don't remember that.

Q. I knew you couldn't do it. You have no remembrance of the contents of that paper, because you can't remember the description of the land he wanted.

A. No, sir, I can remember he wanted this land in these Sections.

Q. What sections? A. Twenty-six and twenty-five.

Q. Twenty-six and twenty-five? A. Yes, sir.

Mr. Gilamn: Thirty-five.

Q. I am testing your recollection a little.

A. I know enough to know what sections join each other.

Q. Then your memory is such that you cannot distinctly state the contents of that paper, you can't give the contents of it. A. I can give the general contents, that's all.

Q. You know there was an application?

A. There was an application, yes, sir, and I know what the application was, you know, except as far as the details of the description.

Q. Let me ask you this question: If Mr. Donovan came there and asked you to be allowed to enter this land in question here, was the land at that time when he first came there, open for selection, or was it not, in 1867?

A. It was open for selection.

Q. It was open for selection?
A. It was open, as near as I—
Q. You say it was?

Mr. Gilman: Let him answer the question.

Q. Do you say it was?

A. It would have been open except for the home-
95 stead entry already upon it.

Q. Then it was not open for selection?
A. No, sir, because of this—
Q. It was not. That is enough answer to the question. It was not, that is right? A. It was not, no, sir.
Q. When he came there the second time, you say he came the second time sometime after that? A. Yes, sir.
Q. Was it then open for selection, or was it not?
A. Well, as far as our instructions were concerned, it was only open on one eighty.
Q. And on the other eighty?
A. So far the homestead entry is concerned, it is not.
Q. It was open then for entry as far as your instructions were concerned, on one eighty? A. Yes, sir.
Q. And not open on the other eighty? A. Yes, sir.
Q. Then what did Mr. Donovan do? A. Took the eighty.
Q. Which eighty? A. That in twenty-six.
Q. He took the eighty in Section 26? A. Yes, sir.
Q. He made a new application? A. Certainly.
Q. He made a new application on the eighty in 26?
A. Yes, sir, that is right.
Q. And that is all of your connection with it?
A. That is as far as I know anything about it.
Q. Were you in the office when he proved up on his homestead? A. No, sir.
Q. That was after your time? A. Yes.

Q. Do you remember of there being a trial as to the
96 cancellation of that Luman Barkley entry?

A. I remember Mr. Donovan coming to the office with his witnesses.
Q. Do you remember who those witnesses were?
A. No, sir.
Q. You can't remember that? A. No, sir.
Q. What time did he come with his witnesses, do you remember? A. I can't give the date.
Q. About what time?
A. I can't give you the date, I should think in the summer of 1867.
Q. In the summer of 1867? A. Yes, sir.
Q. About what time?

A. Well, it was in the summer. I think I would average it about the middle of the summer, if I was averaging it.

Q. You don't know the names of the witnesses?

A. I don't remember the names of the witnesses, no.

Q. Did the trial take place in the office? A. Yes, sir.

Q. Before whom? A. Before me, I took the evidence.

Q. Was Mr. Donovan a witness, do you remember?

A. Was he a witness at that time?

Q. Yes, was he a witness on the trial? A. I think not.

Q. Wasn't he at the trial himself?

A. I think so, yes he was.

Q. He was there? A. Yes, sir.

Q. Was he not a witness on the trial himself?

A. I think not.

Q. You think he was not sworn as a witness?

A. I should think not.

Q. Why, isn't it the proper thing for him to be sworn as a witness?

A. It would be proper, but we seldom swore the man who claimed the land; we seldom took his evidence.

97 Q. Wouldn't it have been proper for him to testify as to the improvement he put on the land?

A. It might have been, but our custom was to take disinterested evidence, and he couldn't very well swear that the man hadn't been on the land.

Q. You think he was not a witness?

A. I am pretty sure he was not a witness.

Q. That evidence would be all reported to Washington, would it not?

A. Yes, sir, a copy of the evidence would be sent to Washington.

Q. A copy of the evidence? Wouldn't the evidence be sent down to Washington as the evidence, that would be the original evidence?

A. It would be the original evidence, yes sir.

Q. The evidence would be reported itself as the report?

A. Yes, sir.

Q. You reported on each case? A. Yes, sir.

Q. It was yours and the Receiver's, yours as Register, and the report of the Receiver? A. Yes, sir.

Q. As to each case? A. Yes, sir.

Q. Do you remember whether there was any notice given of that trial? A. Yes.

Q. How was that notice given, do you remember?

A. It was given in the papers?

Q. In the paper? A. Yes, sir.

Q. What paper?

A. I guess "The Freehomesteader," it was called at the time, I think that was the paper here.

Q. It was a paper published here in Winnebago.

98 A. Yes, sir, it was not necessary to give notice, but we generally did.

Q. You think the notice was published?

A. I think I was, I couldn't tell you.

Q. Was there any other way in which notice of trial was given? A. We sometimes wrote notices.

Q. You sometimes wrote notices?

A. There was no other way. That is the way it was done.

Q. I mean as to that particular trial?

A. No, there was no other way than that.

Q. Your remembrance is that notice of the trial was given by publication in the paper?

A. That is the way almost every notice was given, by publication in the paper.

Q. I am asking you about the notice of this particular trial? Have you any remembrance that the notice was given?

A. We gave the paper all the notices. All the notices were given in the paper at that time. Mr. Holly's brother-in-law was running the paper, and he had to have the money.

Q. Who paid for that notice? Do you know who paid for the notice, who paid for publishing that notice?

A. Why, the officers paid for it, and Mr. Donovan paid the officers.

Q. Did Mr. Donovan pay the officers? A. Yes, sir.

Q. Did he pay you? A. He had to do it.

Q. Have you a distinct recollection of his paying you that?

A. Yes, sir.

Q. How much did he pay you?

A. He paid us for ordering the trial and for the notice, $9.00.

Q. How much was it?

99 A. Nine dollars. That was a matter we set the figure on, on these things, we were always modest. There was no ruling of the Department about it.

Redirect Examination

By Mr. Gilman:

Q. Did you have blanks, printed applications for homestead entry, in your office? A. Yes, sir.

Q. So when applications were made you simply had to fill up a printed blank?

A. Yes, all furnished by the Government. We had blanks for those applications.

Q. Furnished by the Government? A. Yes, sir.

Recross-Examination

By Mr. Dunn:

Q. Do I understand your testimony that when he made his application he made an order for the trial at that time?

A. He made an application at the same time.

Q. He made an application at the same time? A. Yes, sir.

Q. I thought you said at that time he simply made application for the trial?

A. He didn't make an application at the time he ordered the trial.

Q. I understood you to say he did?

A. No, at the time the trial came off, he made application after the evidence was in. We knew what the report was going to be, and he made application for the entries, supposing it was going to go through.

Q. But he made an order for the trial, and he made an application on the day of the trial?

A. Yes, sir, the day of the trial he made his application, whatever day that was.

100 Q. On the day of the trial at that time he made application, that was how long after he ordered the trial that he made the application?

A. It would be about a month usually.

Q. And at the time he made that application the entry of Luman Barkley had not been canceled? A. No, sir.

Q. So he couldn't have taken the land at that time, under any circumstances, because there was still a homestead entry upon it? A. No, sir.

Q. That is what you call the first application?

A. Yes, sir, that was the first application.

Q. After you notified him you say he came again to enter the land? A. Yes, sir.

Q. Did you get your instructions from the General Land Office, relative to withdrawing the lands in the odd sections? I mean relative to the time when this trial was ordered, was it before or after?

A. Well, it was after the trial was ordered.

Q. What is that?

A. It was after the trial sometime; before we got instructions from the general Land Office. We didn't get any instructions until after Mr. Donovan had ordered the trial.

Q. You didn't get any instructions to withdraw these lands in the odd sections in the indemnity until after Mr. Donovan had ordered this trial, you say? A. No, sir.

Q. Do you remember that distinctly? A. Yes.

Q. When did you get your orders to withdraw?

A. I couldn't tell you the date.

Q. About when?

A. They filed two plats, and there were two different orders with reference to them. I couldn't give you the dates.

101 Q. You don't know the dates of the instructions, do you?

Mr. Gilman: They are in the pleadings.

A. The order of withdrawing them would date from the day we acknowledged the receipt of it; from the day we acknowledged the receipt of that order. Any entry that was made up to the time we acknowledged the receipt, would be good.

Q. Now, I want to ask you about the application, you say at the time he ordered the trial this application was not there, it was destroyed as being of no avail? A. Yes, sir.

Q. That is when he came the second time? A. Yes, sir.

Q. And that application was made for the eighty in Section 26? A. Yes, sir.

ADAMS H. BULLIS.

102 Pursuant to notice in the above entitled case, certain depositions are now taken before the same Special Examiner by the same solicitors at the village of Blue Earth, Faribault County, Minnesota, on the 8th day of May, 1901, as follows:

Michael Donovan, a witness of lawful age, and one of the defendants in this cause, is produced on part of the complainant, and being duly sworn testifies as follows:

Examination in Chief

By Mr. Gilman:

Q. Where did you live before coming to Minnesota?

A. In the state of Wisconsin.

Q. What year did you move to Minnesota?

A. In 1867.

Q. Were you married then? A. Yes, sir.

Q. Did your family come with you there? A. Yes, sir.

Q. To what particular point in Minnesota did you come then?

A. I came to the town of Pilot Grove, Faribault County.

Q. Had you any relatives living there then?

A. Yes, I had a brother and his family.

Q. For what purpose did you come to Minnesota then?

A. To get a homestead.

Q. Under the United States homestead laws?

A. Yes, sir.

Q. Did you locate that year upon some Government land?

A. Yes, sir.

Q. Will you give the description of it?

A. It was the east half of the southwest quarter of section 26, and the east half of the northwest quarter of Section 35, Town 101, range 28, Pilot Grove.

103 Q. In Faribault County, Minnesota?

A. Yes, sir, in Faribault County, Minnesota.

Q. How did you happen to locate upon that land? Did you hear anything about it before you located upon it?

A. I heard it was vacant, and I went out and seen it, and it suited me.

Q. Then did you go to the United States Land Office?

A. I went to the United States Land Office in Winnebago City July 6th.

Q. What year? A. 1867.

Q. For what purpose?

A. To see if I could get the land or select it and enter it as a homestead.

Q. What did you learn there?

A. I learned that the land was occupied by one Luman Barkley. He occupied it and entered it. He had entered the claim in 1866.

Q. It was entered by whom? A. By one Luman Barkley.

Q. What were you told?

A. I was told that if I could prove that he had abandoned it, I could get an order of trial on the land, and I did order a trial.

Q. Did you learn that he had abandoned it?

A. Yes, sir, before I went there I was told so by some of my neighbors.

Q. That he had abandoned it?

A. That he had abandoned it.

Q. How long had he been absent from it?

A. He had abandoned it about eight months.

Q. Did you know anything about where he was?

A. I learned from his connections that he was in Canada, and that he had sent word, his cousins told me he had written back that his mother was sick, and he couldn't hold

104 the claim, and that anybody who wanted it could take it, he was not coming back. Then you went to the Land Office? A. Yes, sir, then I went to the Land Office on the 6th day of July.

Q. And told them what you had heard? A. Yes, sir.

Q. And they said you couldn't enter it until his claim was cancelled? A. Yes, sir, until his claim was canceled.

Q. What did they say about the cancelation?

A. They said I should order a trial on the place and bring witnesses to prove that it was abandoned, that he had abandoned the claim.

Q. What was then done about getting the proof of his abandonment, what did you do?

A. I ordered a trial on the place and then went on the quarter.

Q. To prove that he had abandoned it?

A. Yes, sir, to prove that he had abandoned it.

Q. What did you pay for expenses?

A. I paid $9.00 for expenses. The trial was to come off four weeks to my knowledge after that. The trial came off in August, I think the first week in August, and then I went there with my witnesses.

Q. Was the notice published?

A. Yes, sir, notice was published.

Q. Where?

A. In the Winnebago paper. I was served with a copy of it, for three weeks successively.

Q. When the trial came up, it came off before whom?

A. Before Mr. Bullis.

Q. What was proved there?

A. It was proved that by both those witnesses, that he had abandoned the land.

105 Mr. Dunn: We object to this testimony, because the same is a matter of record.

Q. Was there proof offered that he had abandoned the land? A. Yes, sir, proof was offered.

Q. Who were the witnesses?

A. John Donovan and Michael Dullard.

Q. Is that John Donovan any relation of yours?

A. Yes, sir.

Q. What relation?

A. He is my brother's son, he is my nephew.

Q. When was that proof taken, did you say?

A. About that claim, do you mean?

Q. Yes.

A. The witnesses appeared, it was about the first week in August, it was about four weeks after I went up to see about the claim. I went up on the 6th day of July, and in four weeks after that time the trial came off and my witnesses appeared there.

Q. After the testimony was taken, what was done about your making application to enter the land?

A. After the trial was over with, Mr. Bullis took my application and I paid him $15.00.

Q. Your aplication to enter what?

A. To enter that quarter section of land.

Q. The same quarter section of land that was in dispute, that you had the trial on, that Barkley entered? A. Yes, sir.

Q. Was that application in writing? A. Yes sir, in writing.

Q. Did you sign it? A. I did, sir.

Q. Do you recollect whether it was fully filled out, or whether any blanks were left? A. Well, I couldn't say.

Q. As to the date of it?

A. I don't think it was dated, it was left blank I
106 think. I signed the application so that when it would be canceled in Washington immediately after, there might be no mistake but what I would get the claim.

Q. Was that application left with the local Land Officers?

A. The application was signed by me and the $15.00 left there.

Q. The application was left with whom?

A. With Mr. Bullis.

Q. Where did you go then, had you already located upon the land?

A. I had located on the land, right after the trial I built a house.

Q. In 1867?

A. In 1867 I built a house and I broke on the land.

Q. When did you learn that the Barkley entry had been canceled? A. When did I learn that?

Q. Yes. A. Mr. Bullis notified me that it was canceled.

Q. Do you recollect when it was canceled?

A. It was canceled some time in January.

Q. What year? A. 1868.

Q. When did you go to the Land Office again and apply to enter the land?

A. I applied at the Land Office, Mr. Bullis wrote me and I applied, which was about the first week in June.

Q. What year?

A. 1868. I think it must have been about the 5th of June as near as I can recollect, the first week in June.

Q. Did you file an application to enter your previous application at that time? A. Yes, sir.

Q. What did you hear?

A. Why, Mr. Bullis informed me I couldn't get the land, the eighty in Section 35.

Q. For what reason? A. It was railroad land.

107 Q. What did he say about the other?

A. He said "you had better take the other eighty, you can't do any better, you had better enter the other eighty," he said. He said, "I advise you to take the eighty,' so I did, and I entered the other eighty.

Q. Did you have any talk with him or any one else, about your right to enter this eighty in Section 35? Were you told

by him or by any one else that if you held on to it you could probably hold it?

Mr. Dunn: I object to any conversation being gone into with any one else except with a Government official, with regard to that matter.

A. I did, with Mr. Bullis, he was a Government official.

Q. What did he say to you?

A. I asked him if the Railroad Company had any claim on that land. He says, "You go on and work it, work that land, and it will be yours if you stick to it." The Railroad Company has no claim upon that land," he says. He says, "Go on and improve that land and work it, you will get the land in time; the Railroad Company has no claim to that land, and it has no right to it."

Mr. Dunn: I move to strike out the answer of the witness as to what Mr. Bullis told him, as immaterial, and not the best evidence.

Q. You made a written application to enter the tract in section 26 then? A. Yes, sir.

Q. Where did you go after that?

A. I went on and built a house on the land.

Q. You went in 1868 you say, you went and lived on the land?

108 A. Yes, sir, built a house and broke on it.

Q. On what tract was the house you built?

A. I built the house on Section 26, because it was a better building spot than on Section 35. I couldn't get water where Mr. Barkley had his house built, so I built on 26.

Q. How far was it from the line of 35, how far was it away?

A. I think it was not more than twenty-five rods from the road to the house.

Q. What did you do with respect to occupying and cultivating that tract of land on Section 35 in the year 1868?

A. In 1868 I broke six acres on Section 26, and mowed the meadow on 35, mowed the grass for my cattle and cows and put up my hay on 35, cut that eighty in 35.

Q. On the eighty acres in Section 35?

A. Yes, sir. On the eighty in Section 35.

Q. Was there any cultivation of any of the land of the eighty acres in Section 35?

A. There was, it was cultivated, Mr. Barkley had broken, I never measured it, I don't think it exceeded, I don't know whether it exceeded an acre. I wouldn't be positive, I never measured it. It looked to me by scanning it over, it was not quite an acre, but very near it. It was quite a nice little piece of land that was broke.

Q. Did you cultivate it?

A. I fenced it in 1868 and cultivated it, put it into potatoes and cabbage and garden stuff, and kept the fence on it for years.

Q. The balance of the eighty in Section 35, how did you cultivate or use that in the year 1868?

109 A. In 1869, the following year, I broke—

Q. What did you do in 1868?

A. In 1868 I broke on Section 26, and the following year I broke on Section 35.

Q. How much did you break in the year 1869?

A. I think between seven and eight acres in the eighty on Section 35.

Q. On Section 35? A. Yes, sir.

Q. How much did you break, did you say?

A. I think seven acres, between seven and eight acres.

Q. And put it in crop, did you put it into anything?

A. Yes, sir, I put in into sod corn, broke it up and put corn onto the sod.

Q. In the next year, 1870, what did you do?,

A. In 1870, I don't know whether it was 1870 or 1871. I broke seven acres more.

Q. On Section 35? A. Yes, sir.

Q. On the eighty on Section 35?

A. Yes, sir. I don't know whether it was 1870 or 1871, I am not certain as to those dates.

Q. How much did you do right along after that, what did you do?

A. I had twenty acres broke on it when Mr. Thompson bought it, twenty acres in all.

Q. I don't want to go that far along just yet. Up to 1875 did you do some breaking and cultivating each year?

A. Not every year. I didn't break every year until 1875, but I had in 1875, I must have had, I didn't have less than sixteen acres broke in 1875.

Q. And how much fence?

A. I had fourteen acres fenced, besides the garden, for pasture, in 1875.

110 Q. Was that cultivated and fenced?

A. No, sir, only the garden spot, less than an acre.

Q. You say you had about fourteen or fifteen acres fenced, besides the garden spot?

A. I had about fourteen, or fifteen, or sixteen acres fenced for pasture.

Q. How much did you have ploughed up and under cultivation, besides the garden spot?

A. About as near as I can say, about sixteen acres.

Q. How was the balance of the ground on Section 35 used, the balance of that eighty?

A. I used it for pasture and hay. I hadn't pasture enough, so I would cut hay and pasture my cattle on it. But cattle ran at large in those days, so I generally cut my hay on it and didn't cut in the meadow. I didn't have many cattle, and I used the meadow for hay.

Q. You exercised control and dominion over the whole of the eighty, did you? A. Yes, sir.

Q. And each year you broke or cultivated more or less?

A. Yes, sir, and put it into crop every year.

Q. Put it into cultivation in connection with the eighty acres in Section 26? A. Yes, sir.

Q. When did you make final proof of your occupation and cultivation of the eighty acres in Section 26? A. In 1875.

Q. Do you recollect what month?

A. Well, I think it was in the month of June.

Q. It was in '75? A. Yes, sir.

Q. That you made final proof? A. Final proof.

Q. And you got a patent for that? A. Yes, sir.

111 Q. Under the homestead laws?

A. Under the homestead laws. I think I got a patent in July.

Q. Who were your witnesses to prove your occupation and cultivation of that tract at that time?

A. Patrick Hamill and Owen McLaughlin.

Q. Where was that proof taken, before whom was the proof made?

A. That proof was taken in the old courthouse at Blue Earth.

Q. At Blue Earth.

A. Yes, I think before, I don't know, I think Mons Grinnager. I think he was Receiver then at Worthington, either Register or Receiver, he and Mr. Wakefield were in the office; but it was before him, before Mr. Grinnager, he came down here.

Q. Mr. Grinnager took the testimony here in Blue Earth, did he? A. Yes, sir.

Q. Where was the location of the office then?

A. It was at Worthington, he came from Worthington here.

Q. The Land Office was at Worthington when this proof was made?

A. Yes, sir, I got instructions that the testimony would be taken here in Blue Earth.

Q. And it was taken here? A. Yes, sir.

Q. At the time that testimony was taken, state whether or not you offered also to prove your occupation and cultivation of the eighty acres in Section 35.

A. I did so, I attempted to prove it.
Q. You did what? A. I tried to prove it.
Q. What was said?
A. He said he wouldn't take it, he couldn't accept it because I had not entered that land on Section 35.

112 Mr. Dunn: I object to any testimony with regard to this matter, because Mr. Grinnager is dead.

Q. Why was not the proof taken about this eighty in 35, why did Mr. Grinnager refuse to take it, what was the reason the proof wasn't taken?
A. He said I had not entered that piece of land in 35, and he couldn't accept of it.
Q. And he wouldn't take the testimony?
A. No, sir, he wouldn't take the testimony.
Q. Is Mr. Grinnager living? A. No, sir.
Q. How long ago did he die?
A. I think he died about ten years ago, I am informed.
Q. Is Mr. Hamill living? A. No, sir, he is dead.
Q. How is it about Mr. McLaughlin?
A. He is living, he is here in town.
Q. In Blue Earth? A. Yes, sir.
Q. What is his condition? A. He is pretty feeble.
Q. How is his mind?
A. I don't think it is very bright.
Q. Is he able to be around?
A. I think he is able to be around, but I have not seen him since he came to Blue Earth. I have not seen him for several weeks.
Q. How old is he?
A. He is over 80, 83 or 84 I think, he is somewhere over 80 years old. He has been sick this winter with the grippe, and is in bad shape.
Q. After you had made your final proof of occupation and cultivation of the eighty acres in Section 26, how long did you continue in the occupation and cultivation in connection with that of the eighty acres in Section 35?
113 A. I improved it up until April 1885.
Q. Every year? A. Yes, sir.
Q. Up until 1885? A. Yes, sir.
Q. When did you cease to occupy it after that?
A. Mr. Thompson bought the land, and of course I was dispossessed and had to give it up, and he took possession.
Q. He took possession of the land? A. Yes, sir.
Q. Did you consent that he take possession? A. No, sir.
Q. How did he take possession, what did he do?
A. He went on and improved the land.
Q. How did he get you out of possession?

A. Well, he went on working round, he was hoeing, the men were drinking and I did not like his appearance. I didn't want to get into trouble, so I went him to see if I could get him out.

Q. Did he refuse to let you occupy and cultivate the land?

A. Yes, he said he had bought the land and he wanted to keep me off it; he wanted me to get right off it. He said he bought the land and he wanted me to have nothing more to do with it.

Q. Have you since then occupied or controlled possession of the land in any way? A. Yes, sir.

Q. In what way? A. I possessed on it a good deal, and I run a ditch through the eighty, and I always mowed the woods and cleaned the ditch out every time, every year I kept the ditch in running order right through the eighty.

Q. Have you been in continuous occupation of it?

A. Yes, sir I have not cultivated it.

Q. The remainder of Thompson's claim?

A. Yes, sir, but I have pastured on it, pastured this spring on it and herded my cattle on it every year.

Q. How long did Thompson occupy it?

A. Thompson came there in '80 I think, he must have occupied it—

Q. No, he came there in 1882.

A. 1882, he must have occupied it in all, two or six or seven years I think.

Q. Did he build on it? A. Yes sir.

Q. Did you know when he sold it or assigned his contract to Robinson? A. Yes, sir.

[A.] After Mr. Robinson became the owner of it, did Thompson occupy and cultivate it?

A. Yes sir, he worked it on shares.

Q. How long?

A. I think he cultivated it for either three or four years, about four years after Mr. Robinson bought it.

A. I couldn't say exactly, it seems to me he has worked it for three or four years.

Q. What became of him then? A. He moved away.

Q. How was it occupied after that?

A. When Mrs. Robinson had it she rented it part of the time, she rented it to one of the neighbors there for a cash rent. Then for the last two years it was abandoned, I think, but she sold it. After Thompson left it she had it rented out to Sam Moore, I think for a cash rent part of the time.

Q. What is the land worth in your judgment?

A. Well, the land today wouldn't be worth, I think, any more than $25.00 an acre. It is bad shape. It is all
115 grown up in weeds. It is in bad shape, no cultivation on it for the last year at all.

Q. Did you apply to the Land Department at Washington to have your application to enter this eighty acres on the other Section, section 35, allowed and reinstated? A. Yes, sir.

Q. Did you send on an affidavit in regard to the matter, to the Department, yourself? A. Yes, sir.

Q. In connection with Mr. Bullis' affidavit?

A. Yes, sir, and Mr. McLaughlin's affidavit also.

Q. I call your attention to this affidavit, being the original affidavit of Michael Donovan attached to the affidavit of Mr. Bullis, which was referred to yesterday.

Mr. Dunn: You are not introducing this in evidence now.

Mr. Gilman: No, I am calling his attention to it now, but I shall introduce them in evidence.

Said affidavit presented to the witness is marked "Government Exhibit AA," and the affidavit of A. H. Bullis is marked A.

Q. That is your signature, is that your signature?

A. Yes, sir, that is my signature.

Q. Is that the signature of Mr. McLaughlin.

A. Yes, sir, I was present when he signed it.

Q. Did you send these affidavits on to Washington?

A. Yes, sir, they were sent on by my attorney.

Q. Who was that? A. I think it was Mr. Goodrich.

Mr. Gilman: I will offer in evidence these affidavits which have been marked Government Exhibit A and Government Exhibit AA.

Mr. Dunn: I object to them as immaterial, incom-
116 petent and irrelevant, and as not admissible as affidavits.

Q. Mr. Gilman: If necessary, I can return these affidavits to Washington and get certified copies of them, in place of these originals. The fact is, instead of sending us the copies, they sent the originals. I have letters to that effect. If you are going to object that they are not certified copies from the Department, I will send to Washington and get certified copies of these affidavits.

Mr. Dunn: That is not my objection. The objection goes to the fact that the affidavits, as affidavits, are not admissible anyway; they are not testimony taken.

Mr. Gilman: But they are documents as coming from the Land Department.

Mr. Dunn: Yes, they are documents coming from the Land Department, and of course under certain cases they would be admissible, but I don't think they are admissible in this case for this purpose. I object to them as inadmissable, and also as immaterial.

Mr. Gilman: But not because they are originals and not copies?

Mr. Dunn: Not upon the ground they are not certified copies, because I will take your word for it that they came from there.

Mr. Gilman: You admit they are original documents?

Mr. Dunn: Yes, I don't doubt that. I do not object to them upon the grounds that they are not certified copies.

Mr. Gilman: Do you admit that these indorsements
117 upon them are the indorsements of the Land Department?

Mr. Dunn: I presume so. You say they are, and I don't know anything about that.

Mr. Gilman: This matter is the starting point of this testimony. I will put in the other papers later.

Mr. Dunn: My objection to the testimony goes to the fact that they are inadmissible in any event, whether copies or originals.

Cross Examination

By Mr. Dunn:

Q. When you came to Minnesota in 1867, whose house did you visit first, I mean in Faribault County? A. Visit?

Q. Yes, you had no house of your own? A. No, sir.

Q. Where did you go?

A. The first place I stopped was with Mr. Moore.

Q. What year was that?

A. In 1867; then the next day I went to my brother's.

Q. Where does he live?

A. Pilot Grove, he did then.

Q. Whom did you go to next? What is your brother's name?

A. Dennis Donovan. Then I moved into a vacant house.

Q. What Section did your brother live on in Pilot Grove?

A. I don't recollect, I wouldn't say without the map.

Q. How far from this disputed tract of land?

A. Just exactly, it may be a mile and a half.

Q. Were there any buildings upon this disputed tract of land when you came here in 1867?

A. There were no buildings, there was a lot of logs thrown down that remained there on the ground. I was informed that the building was stolen.

118 Q. Never mind what you were informed about the building being stolen. There was no building.

A. Only those logs were there.

Q. There was no building on the ground?

A. There was no building on the ground erected.

Q. No buildings when you came here? A. No, sir.

Q. You spoke about these logs, where were they, on 35 or on 26? A. On 35.

Q. They were on Section 25? A. Yes, sir.

Q. How far from the line of Section 26 were they?

A. Well, I think they were about fifteen rods from the Section line.

Q. That is, two eighty acres, they are eighty rods wide and a mile long, are they not? A. Yes, sir.

Q. They stand end to end? A. Yes, sir, a mile long and eighty rods wide.

Q. You made some improvements on the land in Section 26, did you not? A. Yes sir, of course I did.

Q. You built your house on Section 26?

A. I built the house on Section 26, yes, sir.

Q. You never built a house on Section 35?

A. No, sir, I couldn't get any water.

Q. Never mind about the reasons, give us the facts. When did you build your house on Section 26? A. In 1867.

Q. 1867 or 1868? A. 1867.

Q. What time in 1867?

A. I built the house that summer. I kept at it. I moved in the 1st day of October in 1867.

119 Q. In 1867? A. Yes, sir, in 1867.

Q. Then you were living on Section 26 when you went up to the Land Office?

A. In 1868 I was living on that quarter section.

Q. In 1867 when you went to the Land Office, were you not living on Section 26? A. I was not.

Q. In 1867 when you went to the Land Office you were not living on Section 26?

A. No, sir, not when I went first to the Land Office. I told you I came back and built a house on that quarter. I had no right to do so, of course.

Q. Don't argue the question; answer my questions. Let us understand each other please. You went to the Land Office in 1867 in July? A. Yes, sir.

Q. And you had then moved and were living on that land at that time? A. No, sir.

Q. Not on any of it? A. No, sir.

Q. When did you first, after that day, go on to this land for any purpose after July 1867, when did you locate on that land for any purpose?

A. I went right on the land after I came from the Land Office.

Q. What day was it when you went on the land?

A. I don't know. I didn't break on it right away.

Q. You didn't break on it right away?

A. No sir, I went up to the Land Office and came back. I think I didn't break on it, maybe after—I broke on it after the trial.

Q. After the trial? A. Yes, sir.

Q. Then you went to the Land Office you said in July 1867?

A. Yes, sir.

120 Q. And ordered a trial? A. Yes, sir.

Q. What else did you [—] besides ordering a trial, anything else? A. I don't understand you.

Q. Did you do anything else concerning the land, except to go there and order a trial on it in July 1867?

A. No, sir, that is all I done, ordered a trial on the land.

Q. Then you came back where?

A. I came back and commenced to improve it.

Q. Came back and commenced to improve it?

A. Yes sir, after the trial.

Q. After the trial? A. Yes, sir.

Q. When was the trial? A. The trial was in August.

Q. Then you did nothing on the land between the time you ordered the trial and the time the trial took place?

A. I wouldn't be positive as to that.

Q. You wouldn't say positively as to that?

A. No, sir, but to the best of my memory I didn't make any improvements on the land until that trial came off.

Q. Not until the trial came off? A. No, sir.

Q. The trial came off when?

A. In August I think the first week.

Q. Then in August you went on and commenced to build a house on this land, did you? A. Yes, sir.

Q. That was on Section 26? A. Yes, sir.

Q. You broke some? A. I broke six acres.

Q. How far from the line? The north line of 35 is the south line of 26? A. Yes sir.

Q. How far from the north line of Section 35 did you

121 build your house? A. From the north line of 35?

Q. Yes. A. I told you it was about fifteen rods.

Q. About fifteen rods? A. Yes, sir.

Q. Isn't it further than that?

A. I said twenty rods from the Section line of 26.

Q. You said twenty-five rods?

A. No, I said twenty. It might be twenty to twenty-five rods.

Q. Twenty to twenty-five rods from the north line of 35?

A. Yes, sir.

Q. How far south of your house did you commence to break?

A. It was right south of the house; I don't remember if I broke up to the line. I broke six acres south of the house, but I don't remember whether I broke up the line or not.

Q. You don't remember whether you broke to the south line of Section 26, or not? A. No, sir, not the first time.

Q. That is in 1867? A. No, sir.

Q. You do know you did break on Section 35 in 1867 did you? A. In 1867?

Q. Yes. A. No, I didn't break any in 1867 on 35.

Q. What did you do in 1867 on 35, if anything?

A. Cut hay.

Q. Then you cut some wild hay on it?

A. Yes, sir, cut some wild hay on it.

Q. What part of Section 35 did you cut wild hay on in 1867?

A. I cut on—what part of it?

Q. Yes, what part of it, what part of 35?

A. I cut on the west part of the eighty.

Q. You cut on the west part of the eighty? A. Yes, sir.

Q. The west part of the eighty? A. Yes sir.

122 Q. Did you know where the lines were?

A. Yes, sir, I did.

Q. That whole country was vacant, was it not?

A. It didn't make any difference?

Q. Answer the question. The whole country was vacant there was it not at that time? A. No, sir.

Q. How many settlers were there near your land at that time?

A. It was settled clear up. There was two settlers right outside of my land, yes, sir.

Q. Which way? A. They were west, there was none south.

Q. And there was none east?

A. Oh yes to the east it was occupied.

Q. But there were none south?

A. No, there was nothing south.

Q. You cut some hay on Section 35 in 1867? A. Yes, sir.

Q. That is all you did do? A. That is all I did do.

Q. You built your house on Section 26? A. Yes, sir.

Q. And broke six acres on 26? A. Yes, sir.

Q. And in 1867? A. Yes, sir.

Q. But you did nothing on Section 35?

A. I didn't break any.

Q. You say this trial was had at what time? A. In August.

Q. In August? A. Yes sir.

Q. Were you there at the time of the trial? A. Yes, sir.

Q. What were you doing there at the trial?

A. I was there with my witnesses.
Q. With your witnesses? A. Yes, sir.
Q. What else did you do there, anything else?
A. Yes, sir I did.
123 Q. What did you do?
A. After the trial was over with Mr. Bullis took my application for the land.
Q. After the trial was over with?
A. Yes, sir, after the witnesses proved that the land was vacant.
Q. Then Mr. Bullis took your application for the land?
A. Yes, sir.
Q. For what land? A. The quarter section.
Q. Which land was that?
A. The piece in 26 and the piece in 35.
Q. That was not a quarter section, was it?
A. Yes, sir, it was a quarter section, I call it so. I made my application for the east half of the northwest and the east half of the southwest.
Q. That would be two halves of a quarter section?
A. It was, yes.
Q. But it wouldn't be a quarter section?
A. That was what my application was for.
Q. What is that?
A. Well, anyhow, he took my application for a hundred and sixty acres all right.
Q. Who took your application? A. Bullis did.
Q. Bullis took your application? A. Yes, sir.
Q. Was that application printed or written?
A. I couldn't say what it was.
Q. You can't say whether it was printed or written?
A. No, sir.
Q. Can you swear anything about what you did when you made that affidavit?
A. I wouldn't say what I did. I know I signed it.
Q. What date was it that you signed it?
A. I couldn't tell you the date I signed it. I can tell you when I think it was. I think it must have been about the 6th or 8th of August.
124 Q. The 6th or eighth of August?
A. Yes, sir, as near as I can tell you. It was the first week in August, I think. It was certainly the month of August that the trial was.
Q. The trial was in August? A. Yes, sir.
Q. You are sure of that? A. Yes, sir.
Q. But as to the exact date you don't know?
A. No, sir, I couldn't tell you the date.
Q. What did you do with that application?

A. I didn't take it.
Q. What was done with it?
A. Mr. Bullis, I suppose kept it. It was his business. He was the only one doing business there.
Q. He was the only one doing business there?
A. Yes, sir.
Q. That is, the only officer you saw about it, was Mr. Bullis?
A. Yes, sir.
Q. The entry at that time had not been canceled, had it?
A. Yes, it had been canceled.
Q. It was not canceled at the time you made your application?
A. No, the land was not canceled then.
Q. The land was not canceled then? A. No, sir.
Q. So you knew you couldn't take it then?
A. I did. I knew I couldn't, because it wasn't canceled by the Government.
Q. Then you went right home after that? A. Yes, sir.
Q. That was in 1867, August 1867? A. Yes, sir.
Q. Where did you go to?
A. I went on and built the house.
Q. You built the house after that?
A. Yes, I built the house after that.
Q. You didn't build any house before that? A. No, sir.
Q. That was all that was done that year, 1867?
125 A. Yes, that was all. The house was built and six acres were broke.
Q. You got word, you said afterwards that the entry was canceled? A. Yes sir.
Q. You learned that Mr. Barkley's entry was canceled?
A. Yes, sir.
Q. Then you went to the Land Office again? A. Yes, sir.
Q. What time did you go there the next time?
A. The fifth of June.
Q. What time did you get word that the entry was canceled?
A. I repaired to Winnebago just as quick as I could after I got the letter from the office that the entry was canceled. I repaired there as well as I could. Of course, we had to go on foot or by team. Perhaps I didn't go there for two or three days, I think I went within two or three days.
Q. You think you went there within two or three days?
A. Yes, I went as quick as I could go, as quick as possible, to get the land.
Q. Then you made another application?
A. I wouldn't swear whether they used the old application, or whether they made a new application, whether the old one was used or not.

Q. Did you see the old one?
A. No, sir, I didn't see it when I went there the last time.
Q. You didn't see it at all? A. No, sir.
Q. You don't know whether they made a new application or not?
A. I couldn't say whether he did or not.
Q. Then after that you went home, did you, from the Land Office? A. Yes, sir.
Q. What did you do then?
A. I was breaking, I was still breaking on the land.
126 Q. After you went up there and put in your application for the land, in June 1868, what did you do when you went home?
A. In June '68 I went back and broke on Section 35, and cropped it with sod corn.
Q. That was in June? A. Yes, sir.
Q. Was that before or after you went to the Land Office?
A. I went to the Land Office the 5th of June.
Q. When did you commence to do your breaking on Section 35?
A. The breaking was done in the month of June, I done that breaking in June, and put in the corn.
Q. What time in June?
A. I don't know. It was in the month of June.
Q. Was it before the 5th?
A. I can't say it was before the 5th.
Q. Do you think it was after the 5th, or do you mean it was after the 5th?
A. It was in the month of June, it might have been the first and it might have been the 5th, I wouldn't swear.
Q. You don't think it was the 4th or 5th?
A. I couldn't solemnly swear.
Q. You say you made your application and went out there and broke?
A. I went out there and broke on section 35 in June, I know that.
Q. Was that before or after the entry was canceled?
A. I could not swear whether it was before or after.
Q. You can't recollect?
A. I don't remember whether I had broken before that.
Q. Isn't your memory a pretty good worker?
A. Yes, sir, but sometimes I forget things.
Q. What more after that did Mr. Bullis tell you?
A. In June?
127 Q. Yes. A. Generally my memory is pretty good.
Q. Well give us your memory about it, tell us about when you broke, whether it was before or after that?

A. I broke on it in the month of June, and planted corn on it, I know that.

Q. But you don't know whether it was before or after the 5th of June?

A. No, sir, I broke I know in the month of June. It was only a question of a few days. I can't tell whether I started breaking along about the first of the month or not.

Q. What part of Section 26 did you break on in June?

A. In June?

Q. Yes.

A. I didn't break any on 26 in June. I broke on 35 in June.

Q. You broke on 35 in June? A. Yes, sir.

Q. That was after you had been to the Land Office and you found you couldn't take the land on 35, that you went on to it and broke on it? A. Yes, sir, I broke on it.

Q. After you had ascertained you couldn't take that land on 35? A. Yes, sir.

Q. You ascertained that? A. Yes, sir.

Q. And yet you went and broke on it?

A. Yes, sir, I broke on it.

Q. He said you could only take that land in 26, but you went home and broke? A. Yes, sir.

Q. And you broke on 35? A. Yes, sir.

Q. Instead of 26? A. Yes, sir.

Q. There was nobody there to dispute you?

128 A. I don't see how they could, because it was Government land.

Q. It was Government land?

A. I don't see how any one could dispute my rights there.

Q. Nobody, in fact, was on the land at that time?

A. How could they be, it was abandoned by Barkley.

Q. That was in 1868? A. Yes, sir, 1868.

Q. What part of 35 did you break on in 1868?

A. I broke, I first started in to break right on the line.

Q. Right on the line? A. Yes, sir.

Q. What line? A. The line between 26 and 35.

Q. The north line of 35? A. Yes, sir.

Q. That would be the south line of 26? A. Yes, sir.

Q. You had broken the year before on to the south line of 26, or the north line of 35, had you not?

A. No, sir. I didn't break to the south line of 26 the first year.

Q. I thought you said you did?

A. No, sir. I know I remember the next year I broke up to the line of 35 and 26 and then I broke over the line.

Q. You kept right on breaking south? A. Yes, sir.

Q. And broke over the line of 26 and onto 35? A. Yes, sir.

Q. So it all went into one field? A. Yes, sir.

Q. So then you broke into 35? A. Yes, sir.
Q. How far south of the north line of 35 did you break? How many rods? A. I couldn't tell you that.
Q. Did you break a piece—
A. I broke a piece 50 rods long I should think.
Q. How far south of the line did you break, do you know?
A. I don't know, I couldn't say that. I never meas-
129 ured it. I broke eight acres along the north line.
Q. Was it two or three rods south of the line?
A. Yes, sir, ten rods south of the line, and over, but I never measured it.
Q. How long was the piece?
A. The piece I broke was 50 rods long.
Q. Fifty rods east and west? A. Yes, sir.
Q. And about ten rods north and south?
A. Yes, sir, it must have been that.
Q. Then you broke about ten rods over the line?
A. I broke eight acres. I don't know how far. It might have been I broke more than that over the line.
Q. Well, then you broke about ten rods south of the line?
A. I don't know, I never measured it.
Q. Then you are guessing, just guessing at it?
A. I won't guess at it at all, because I don't know and I am swearing to the truth. I know I broke eight acres in that piece.
Q. How many rods are there in an acre?
A. 160 rods I guess.
Q. Then can't you tell how many rods south you broke?
A. No, sir. I think any man of common sense can tell when he breaks about eight acres.
Q. Then you think you broke about ten rods south?
A. I couldn't tell you that.
Q. Did you break forty rods south?
A. I didn't, not then?
Q. Did you break 30 rods south?
A. No, sir, not in that year.
Q. Did you break twenty rods south? A. I might have.
Q. It might have been twenty rods south then, of the line?
A. I broke a piece fifty rods long, forty-five to fifty rods long, and in my judgment [and in my judgment] I broke
130 eight acres on Section 35.
Q. You broke some over the line? A. Yes, sir.
Q. But you don't know how much?
A. I broke eight acres.
Q. When did you break over the line?
A. Broke over the line?
Q. Yes. A. That was in 1868.

Q. In 1868 then you broke over the line? A. Yes, sir.
Q. What did you do in Section 35 besides that?
A. I fenced the lot that Barkley broke, fenced it with common posts and rails.
Q. How much?
A. There was on 35 about fifteen rods over the north line; I think about fifteen rods to my knowledge.
Q. About fifteen rods over the north line? A. Yes, sir.
Q. Did you connect your breaking with his breaking?
A. Not the first year.
Q. How much did he break?
A. As I said before, I thing it was not quite an acre.
Q. He had a piece broken?
A. He had a piece broke off the north line.
Q. That was in 1868? A. Yes, sir, that I fenced that.
Q. What did you fence it with?
A. I fenced it with common posts and rails, I split the rails out of the woods and nailed them on posts four feet high.
Q. The next year you broke some on 35, did you?
A. I don't think it was the next year, I think it was the following year, I think I broke seven acres. In 1868 I broke eight acres; In 1869 I didn't break any on that piece, and in 1870 I broke six or seven acres more.
131 Q. Then, you connected the eighty acres right beside it by another strip broken right along south?
A. Yes, sir.
Q. Is that all the breaking you did?
A. No, sir, I broke twenty acres in all.
Q. When did you break the other?
A. Well, it was along in 1874 and 1875 I broke the balance.
Q. In 1874 and 1875 you broke the balance?
A. Yes, sir. It might have been in the neighborhood of probably twenty acres of breaking in all, on the eighty, it might have been twenty-two, twenty acres more or less.
Q. You raised a crop on that, did you?
A. Yes, sir. Every year I ploughed and cultivated it and raised crops on it.
Q. And all this time when you didn't have any title to the land? A. I had no title to it, of course.
Q. Coming along later down than that, was there a time when you quit work there at all?
A. No, sir, I didn't quit it until Mr. Thompson bought it.
Q. After Mr. Thompson bought it? Whom did he buy it from, from the Railroad Company?
A. I think he bought it from Frederickson & Hanson.
Q. You understood it was through the Railroad Company?
A. Yes, sir, Frederickson was the main man.

Q. You understood he was selling it for the Railroad Company? A. Yes, sir.

Q. Did you offer to buy it yourself of Mr. Fredrickson?

A. He offered it to me.

Q. He offered it to you, did he? A. Yes, sir.

132 Q. You didn't buy it? A. No, sir.

Q. Mr. Thompson bought it?

A. Yes, sir, Mr. Thompson bought it.

Q. And he came there? A. Yes, sir.

Q. After he came there you quit occupying the land, did you?

A. Yes, sir, I had to, of course; we had a suit then.

Mr. Gilman: It seems that Boyeson had a contract and assigned it to Fredrickson, and Fredrickson assigned it to Thompson and Thompson assigned it to Erichsrud.

Q. You never had any house on this land on Section 35?

A. No, sir, one house is enough on a quarter; that is all the Government asks for, one house.

Bert Donovan, a witness of lawful age produced and sworn on the part of the Government, testifies as follows:

Examination-in-Chief

By Mr. Gilman:

Q. Are you a son of Mr. Michael Donovan, who has been testifying just now? A. Yes, sir.

Q. Do you recollect when your father moved into Minnesota?

A. Yes, sir, I have some recollection of it, yes, sir.

Q. Did you come with him? A. Yes, sir.

Q. How old were you at that time?

A. I must have been about eight years old seven or eight.

Q. Do you know when your father settled and built a house on this tract of land where he lived in Section 26?

A. Yes, I remember when we moved onto it, it was in the summer we moved on to it.

133 Q. Do you recollect what year that was?

A. It was 1867, I think; of course, I don't remember so much about the date, being young, but I remember when we moved there.

Q. Did you know of the line between these eighty acres, the tract on Section 26, the line between the eighty acre tract in Section 36, and the eighty acre tract in Section 35? Did you know that they joined, that the tracts joined?

A. Yes, sir, I know where they joined, where the road is.

Q. Is there a road between the two tracts? A. Yes, sir.

Q. On the south line?

A. Yes, sir, there is a road between the two tracts of land.

Q. Do you recollect your father cultivating, having any cultivation on that land in Section 35, in 1868? A. Yes.

Q. For each year right along?

A. Yes, sir. I helped to cultivate part of it for a number of years myself, and helped take care of the grain.

Q. Do you know how many acres he had under cultivation, in the tract on Section 35, say for the first few years that he lived there, how many acres under the plough?

A. Well sir, I don't know really; perhaps it was seven acres or eight acres, or maybe more. I remember there was quite a little breaking there, but I don't remember exactly how much it was. Of course, it grew somewhat as we did.

Q. Was there more or less of that land in the tract in Section 35 cultivated every year from 1868 up until 1875?

A. Yes, you we cultivated a little of it during that time.

Q. How was that which was not under cultivation, 131 used?

A. There was a pasture on some of it, and some of it we cut hay on, and some of it we used to feed cattle on.

Q. Was there any of it under fence? A. Yes, sir.

Q. How much was under fence, do you think?

A. Perhaps somewhere near fifteen acres, somewhere around that.

Q. What kind of a fence was it?

A. It was a hedged wire fence, posts and hedged wire.

Q. Did you live there and work with your father for a good many years? A. Yes, sir.

Q. How long?

A. I worked, I have been with him most of the time, in fact, since we came on the place, except a few years I spent in town. I always used to be there in the winter and a small part of the summer, taking care of the grain.

Q. You helped your father cultivate the land?

A. Yes, sir, I helped cultivate the land.

Q. You were not present at the time he made the application to enter it, I presume? A. No, sir, I was not, no.

Q. Nor were you present at the time I presume, when he made final proof of his occupation and cultivation of the 80 acre tract on Section 26 in 1875? A. No, sir, I was not.

Q. How long did your father continue in the occupation of that land before he was dispossessed? Do you recollect what year he was dispossessed?

A. It was the year 1885, I think; 1885; somewhere around that time.

Q. But until that time was he in possession, cultivation and occupancy of that eighty acres in Section 35, every year? 135 A. Yes, sir.

Q. A portion of it under the plough?

A. Yes, after we proved up on it.
Q. You never paid any taxes on 35?

Mr. Gilman: You never proved up on 35, so you never paid taxes on 35, did you. [—] I don't know whether father did or not I never paid any taxes on it myself.

Q. You used to herd cattle on it, you said.
A. Yes, sir, I have herded cattle there.
Q. There were cattle running round there and you used to herd them on it? A. Yes, sir.
Q. Mr. Donovan used to run a herd there? A. Yes, sir.
Q. And you would take care of the cattle and herd them all the country round?
A. I used to herd them myself.
Q. Your father what you called ran a herd there?
A. Yes, sir.
Q. For several years? A. Yes, sir.
137 Q. They ran on this eighty, as well as on any other vacant land there?
A. No, sir, we had our crops there. We didn't pasture that. We had to move and corral them out south further.
Q. But you herded them and the herd ran on this land, and on other vacant land there?
A. We cut hay on that though.
Q. What did you mean by saying you herded cattle on it?
A. That was further off. It was our own stock we herded on it.
Q. You just simply looked after your own stock on it?
A. Yes, sir.
Q. You didn't run a regular herd on it?
A. No sir, just our own stock.

George D. Moore, a witness of lawful age, produced and sworn on part of the Government, testifies as follows:

Examination in Chief

By Mr. Gilman:
Q. Where do you live? A. I live in Blue Earth City.
Q. How long have you lived here?
A. I came here in 1876, I think.
Q. Do you know Mr. Michael Donovan? A. I do.
Q. How long have you known him?
A. I have known him since June 1870.
Q. Since June 1870? A. Yes, sir.
Q. Where was he living then?
A. He was living on the same farm that he lives on at the present time.
Q. Is that the tract of land that he got under the homestead law on Section 26? A. Yes, sir.

Q. How far did you live from him when you first saw him?

138 A. I had the southeast quarter of Section 34, and the northwest quarter of the northwest quarter of Section 35, and I bought the forty acres of the Railroad Company in 35.

Q. You lived neighbor to him?

A. Yes, sir, I lived neighbor to him in 34.

Q. You knew where he lived, and what ground he was cultivating and occupying? A. Yes, sir.

Q. Was he, when you first knew him, cultivating and occupying any portion of the eighty acres in Section 35 that is in controversy?

A. Yes, sir, he had quite a field broken there in 35. We would see it in coming from my place to Blue Earth, I had to go right through his, that is along the road that went near the line between 26 and 35. He had quite a piece broke on 35. It was supposed to be in 35, on the south side in 35.

Q. How was that cropped, in what crops?

A. Oh, he had different crops in there.

Q. Different years? A. Yes, different years.

Q. Do you know whether he had any under fence?

A. Yes, sir, he had quite a patch fenced. I don't know how much there was under fence. He had fencing that he got from the timber. I can't say how much fence there was.

Q. Do you know how he occupied the balance that was not ploughed up under cultivation?

A. Well, most of the time he mowed it. As far as my recollection is concerned, he used to pasture the cattle south of the breaking, he used to pasture the cattle there.

139 Q. Was there a portion of that eighty acre tract of land that was better suited for grass and hay, cutting hay, than other portions of it?

A. Yes, sir, I should suppose there was about twenty acres, very nearly twenty acres, that was at the outlet of that little lake, was fixed better for cutting grass.

Q. Did he used to cut that for hay? A. Yes, sir.

Q. And the upper ground was used for pasture?

A. Yes, sir, the upper ground was used for pasture, which was not broken.

Q. That is, what was not broken, was used for pasture.

A. Yes, sir.

Q. How was the ploughed ground protected from cattle?

A. I think there was a herd law about there, and people had to look after their own cattle. But he had fences, he had some fence there, and every person had to look after their own cattle, so the children could herd the cattle away from the crops.

Q. Keep the cattle away from the crops?

A. Yes, sir, keep them away from the crops.

Q. How long did he continue in the occupation and cultivation of this eighty acre tract in Section 35, from time to time?

A. I came here in 1876, and after that time I had rented my farm and I didn't go up there very often. I was under the impression he had cultivated it until some time along in 1880, but I wouldn't say positively. I know whenever I was informed by him that Thompson had taken possession of it was some time in the eighties.

Q. Not in the year 1880?

A. No, sir, some time in the years eighty. I don't know what year in the eighties it was.

140 Q. As long as you lived up there, he occupied and cultivated this eighty in Section 35?

A. Yes, sir, he lived there and occupied and cultivated land on that Section.

Q. When you were out there, there appeared to be about the same cultivation and occupation there? A. Yes, sir.

Q. Until he was dispossessed by Thompson? A. Yes, sir.

No Cross Examination.

It is agreed and stipulated between the respective Counsel that the signatures to the depositions of Michael Donovan, Bert. Donovan and George D. Moore, are waved, and that the depositions shall have the same force and effect as if the signature of each deponent had been affixed thereto.

140A Government Exhibit "A".

State of Minesota,
Faribault County—ss.

Adams H. Bullis being first duly sworn says that he was Register of the Land Office at Winnebago City, Minn. during the year 1868; that on the 6th day of June A. D. 1868 Michael Donovan made application to this affiant at said Land Office as such Register to take and enter under the homestead act and as a homestead the E. ½ of the N. W. ¼ of Section 35 Town 101, Range 28 and the East ½ of S. W. ¼ of Section 26 Town 101 Range 28 subject to entry at such Land Office. That this affiant as such Register refused to allow said Donovan to take or enter under the homestead act the said E ½ of N. W. ¼ of said Section 35, but would only allow said Donovan to take and enter under said act E. ½ of S. W. ¼ of Section 26; and this was done under general instructions theretofore received from

the Commissioner of the General Land Office at Washington D. C.

A. H. BULLIS.

Subscribed and sworn to before me
February 10th, 1888.

[Notarial Seal] BENJAMIN G. REYNOLDS,
Notary Public, Minn.

Indorsed: Affi'd of A. H. Bullis Refusing to allow M. Donavan to enter under homestead act E. ½ N. W. ¼ S. 35, T. 101, R. 28. Minnesota.

140B Government Exhibit "AA".

State of Minnesota,
Faribault County—ss.

Michael Donovan being first duly sworn says that he is the Michael Donovan mentioned in the affidavit annexed of A. H. Bullis Register formerly of the Land Office at Winnebago City Minn. that at the time he made application to enter the E. ½ of N. W. ¼ of Sec. 35 Town 101, Range 28 in said County, as stated in affidavit of said Bullis he had taken possession of said land and upon the refusal of the Register to allow him to enter same as a homestead this affiant still held possession of said land and made improvements thereon and cultivated the same; that in the year 1868 after making such application and refusal to allow this deponent to enter same this affiant built a fence of posts and rails about four feet high around ½ acre of land broken on said E. ½ of N. W. ¼ and cropped said ½ acre and broke same year 7 acres and cropped the same in sod corn and broke thereon 7 acres more thereafter. That said last 7 acres was broken after 1870. That said other improvements remained on said land and were on said land on and before Nov. 29th, 1870. That after breaking said land this affiant planted and cropped said land year after year for 5 years and upwards. That in 1881 this deponent fenced about 15 acres of said land and used same for pasture, fence made of two wires and posts and the same is still on said land.

MICHAEL DONOVAN.

Subscribed and sworn to before me Feby 10, 1888.
[Notarial Seal] BENJAMIN G. REYNOLDS,
Notary Public.

140C State of Minnesota,
County of Faribault—ss.

Owen McLaughlin being first duly sworn says that he has heard read the above and foregoing affidavit of Michael Dono-

van and knows the contents thereof and that the same is true of his own knowledge.

OWEN McLAUGHLIN.

Subscribed and sworn to before me Feby. 10th, 1888.

[Notarial Seal] BENJAMIN G. REYNOLDS,
Notary Public.

(Indorsed)

Application of Michael Donovan for the institution of proceedings under act of March 3, 1887 to recover title to described land.

Forwarded to Secretary of the Interior Feby. 14, 1889 with adverse opinion. A. H. B.

Stamped with stamp of Department of the Interior. Received April 14, 1890 (?) (Very Illegible)

141 On the 30th day of October, A. D. 1901, pursuant to adjournments agreed to between respective counsel, the parties being present by their counsel, the further taking of testimony in this cause is proceeded with, in the presence of the Special Examiner at his office in the Federal Building, St. Paul, Minnesota, as follows:

Michael Donovan, is recalled on the part of the complainant, and testifies as follows:

Examined by Mr. Gilman:

Q. Since your former testimony in this suit, have you thought the matter over, so as to be able to state, whether it was in 1868 or 1869 that you first did the plowing on his tract of land which is in question? A. Yes, sir; in 1868.

Q. In 1868? A. Yes, sir.

Q. Did the road at that time, the public travelled road, wagon road, run on the section line, between sections 35 and 26?

A. Yes sir. The government stakes were up, the government corners were there.

Q. The land that you plowed up on this tract of land in question in section 35, lay on which side of the road?

A. On the south side of the road.

Q. So there is no question, as to what tract you were breaking on? A. No, question, sir.

142 Q. About how many acres did you say you broke up and put into sod corn in 1868? A. In 1868?

[A.] Yes. On this tract?

A. It was between 7 and 8 acres.

Q. Between 7 and 8 acres?

A. Yes, sir. As near as I can guess at it; as near as I can get to it; broke it in company—

Q. Did you afterwards, in subsequent years, break up more land, south of what you broke up in 1868?

A. In 1871 I broke twelve acres more on the place.

Q. Adjoining this that you broke up in 1868?

A. Yes, sir. It was, well, it was very near—I paid for twelve acres of breaking so I think that must have been it.

Q. You hired that broke? A. I hired that broke.

Q. Did you put it into a crop? A. Yes, sir.

Q. How much did you have broken up in 1875, altogether? I mean on this tract in question?

A. It was between eighteen and twenty acres.

Q. Between 18 and 20 acres? A. Yes, sir.

Q. Was that which you broke up put in crop every year?

A. Every year, yes, sir.

Q. In addition to that, I understood you to say, there was about half an acre south of that, that you had broken up on that tract which you had in cultivation, fenced as a garden spot? A. Yes, sir; it was, with posts and rails.

Q. That had been broken up by Barclay, before you located there? A. Yes, sir.

143 Q. But you continued cultivating that thereafter, as long as you remained there? A. Yes, sir.

Q. How much, did you say, you had fenced in on this land, for the purposes of a pasture? A. Fourteen acres.

Q. Altogether?

A. Altogether I had fourteen acres for pasture land, the crops I didn't have fenced. I had just a pasture for the cattle.

Q. And the balance of the land how was that used?

A. I cut hay on there.

Q. And you occupied, either as pasture, or for raising crops, or for cutting hay, the whole eighty acres? A. Yes, sir.

Q. Up until the time that you were dispossessed in 1885?

A. In 1885 yes, sir.

Q. Were there any buildings on that tract of land, the tract in section 35, that is in controversy?

A. Never. No buildings.

Cross-Examination

By Mr. Dunn:

Q. Was it a laid out road between section 35 and section 26—

A. I think it was between 35 and 26. We claimed a laid out road on the section lines.

Q. Wait a minute. I did not finish my question. A. Go on.

Q. Was it a laid out road between section 35 and section 26, between these two eighties in 1868? Was it a laid out road?

A. That is what we claimed. That is was a laid out road between them on the section line.

Q. I want an answer to my question. Will you answer my question?

A. I will answer your question just like this; it was
144 on the government section, if you will permit me to explain; we claimed—

Q. That was, I understand, what you claimed, but it was not, you say, a laid out road?

A. No sir; it was not a laid out road; it was—

Q. That is all I wanted.

A. We claimed it was on a government section.

Q. I don't care what you claimed. I want you to answer the question. You claim a good deal. Is it not a fact that when you testified to Mr. Gilman you said it was a road between these two sections; you mean to say it was on the section line, and that you considered it a road?

A. Yes, sir; on the section line, and we considered the section lines a road. When there is a road on a section line we considered that a road.

Q. That is your answer to the question? A. It is.

Q. Isn't it a fact, Mr. Donovan, that you built your house on Section 26? A. Yes, sir.

Q. About 20 rods from the line of section 35?

A. I think that is about it. I never measured it; I think about that. About that, I should think.

Q. About 20 rods from the line? A. Yes, sir.

Q. That is, the line between—

A. Between 26 and 35.

Q. Between 26 and 35? A. Yes, sir.

Q. This tract of land in section 35 is directly south of section 26, isn't it? A. Yes, sir.

Q. And your breaking that you did in 1868 was done
145 partly on section 26, and partly on section 35?

A. Yes, sir.

Q. And it adjoined, did it not?

A. The section lines joined.

Q. There was nothing but an imaginary line between them, they joined?

A. The section lines, the government lines?

Q. The breaking joined? A. Yes, sir.

Q. The breaking was one compact mass?

A. No; the road was between them. We supposed the road was on the section line.

Q. Did you leave a space of two rods or four rods for a road between these breakings?

A. Yes, sir. I don't know what it was we left. I don't know whether we left two rods or four rods; but we left a

strip there that we didn't break. I don't know whether we left two rods or four rods.

Q. You left a strip between the two breakings, did you?

A. Yes, sir; between the two breakings.

Q. Between the two pieces of breaking? A. Yes, sir.

Q. How did you find that out? When you testified before, you testified that it was all together. When did you find out that there was a strip between them?

A. I didn't testify to that before.

Q. I think you did. I think you testified that it was all together, that it was all adjoining?

A. It couldn't be all together, because the section corner was there; and we knew where the road should be. There must have been a strip, because we were not allowed to break the road. There must have been a strip between them.

Q. I don't care what there must have been. You
146 left a strip you [—] between the two pieces of breaking?

A. Yes, sir.

Q. How wide was the strip between the two pieces of breaking?

A. I don't know; two or three or four rods. I couldn't say how much it was.

Q. Who did the breaking?

A. I did myself, and Mr. John Carr.

Q. How much breaking did you have north of the line?

A. North of the line?

Q. Yes. A. I broke six acres in 1867 on section 26.

Q. How much did you have north of the line?

A. I will have to figure that out.

Q. In 1868?

A. I will have to figure it out. Eight and six—I had exactly north of the line; I had just exactly fifteen acres north of the line on section 26.

Q. Fifteen acres north of the line on section 26?

A. Yes, sir; and part of that I broke in 1867.

Q. I am talking about 1868?

A. No, no. I broke that in 1867 and 1868.

Q. In 1868, I am asking you about 1868. How many acres did you break north of the line in 1868? A. About nine acres.

Q. North of the line?

A. North of the line in section 26 in 1868.

Q. How much did you have broken north of the line in 1867?

A. In 1867, I had 9 from fifteen; between six and seven acres. There was fifteen acres exactly north of the road.

Q. Fifteen acres north of the road?

147 A. Yes, sir. Fifteen acres exactly north of the road, I broke in 1867 and 1868.

Q. You didn't break any on section 35 until 1868?
A. Not until 1868.
Q. You didn't build any house on section 35? A. No, sir.
Q. Barclay, you say, had a piece of breaking on section 35? A. Yes sir; on the east half.
Q. He had a piece broken on section 35, on this eighty?
A. Yes, sir.
Q. This disputed eighty?
A. Yes, sir; this disputed eighty.
Q. That was there when you went there. That breaking was done before you went there? A. Yes, sir.
Q. And before you ever saw the place?
A. Yes, sir. The breaking was there when I came out in 1867? When I came out there in 1867 the breaking was done.
Q. He built no house on the land?
A. The logs was there; whether he built a house or not, I don't know. The logs were there.
Q. There was no house built yet?
A. No sir. Part of the building was on the ground. There was the material there; there was the logs there. Part of the material was on the ground; the logs was on the ground.
Q. Where was that? On the disputed eighty?
A. Yes, sir; on the disputed eighty in section 35.
Q. You built your house on section 26?
A. Yes sir. I built my house on section 26.
Q. When did you build your house? A. In 1867.
148 Q. What month?
A. It was in the summer of 1867, some time in the summer; I couldn't tell you what month.
Q. About what month?
A. I came there in July, and I worked at cutting hay, and at building.
Q. No matter about cutting hay; when did you build the house?
A. I moved into the house the first of October; and then up to that time I was working at it, between cutting hay and building.
Q. Then it was some time in the summer of 1867?
Q. Yes, sir; some time in the summer of 1867.
Q. Can you say anywhere near what time is was?
A. I don't know exactly, because I hauled logs part of the time, and I cut hay part of the time.
Q. I don't want your reasons. Never mind about your reasons. Can you state anywhere near what time it was you built your house? A. It was in the summer of 1867.
Q. That you built your house? A. Yes, sir.
Q. What month did you do this breaking in on section 26 in 1867? A. What month?

Q. Yes.

A. We commenced the last week in May and we broke until very near the first of July.

Q. You broke on until the first of July. How many acres did you break in 1867, how many acres on section 26?

A. On section 26?

Q. Yes. A. In 1868?

Q. In 1867?

A. I only broke six acres, about six acres in 1867.

149 Q. I am speaking now about section 26, and you say you broke about six acres. You say you commenced breaking the last week in May, and broke from first to last about six acres by the first of July. A. Also on section 35.

Q. In 1867? A. Yes, sir, 1867. No, sir; 1867?

Q. Yes, I am confining myself to 1867.

A. Yes, sir. That is right.

Q. And in 1868 you commenced to break when?

A. We commenced,—I commenced—that testimony, I thought you referred to 1868. Is that testimony of 1867?

Q. I am now asking you about 1868.

A. I had 1868 in mind.

Q. I am asking you now about 1868.

A. No; I did not break on the first of July, 1867; I only came there the 4th of July. There is a mistake there.

Q. Well, we will, scratch that out, and see if we can get it right. We will commence over again.

A. I thought you meant 1868, I am a little bit deaf.

Q. We will confine ourselves to the year 1867; do you understand that? A. Yes, sir.

Q. In what month of the year 1867 did you commence to do breaking on this eighty in section 26? A. In July.

Q. How much did you break in July? A. Six acres.

Q. Did you do that breaking yourself, or did you hire it done?

A. I done it myself. I hired a man to drive the oxen; but I mean I did the plowing.

Q. Who was the man? A. John Donovan.

150 Q. How long did it take you to break that?

A. I don't know that. It is so long ago, it is pretty hard to tell. We only broke on an average, we averaged about an acre and a half a day; it was so wet.

Q. Then it took you about four days to break it?

A. I think it must have taken that long. It was very wet. We had a good deal of rain. It was a very wet year that year was; you know it was a wet year.

Q. No, I don't know anything about it. Now, that is what you did in 1867? A. Yes, sir, that is about it.

Q. Now, we will talk about 1868, and not 1867, you understand that? A. Yes, sir.

Q. In what month did you commence to break in the year 1868? A. The last week in May.

Q. Do you know how much you broke? How much did you break? First, I will ask you how long you broke. How long did you break?

A. We broke into the first week in July.

Q. How much did you break? A. On these two pieces.

Q. Yes. I will get at the both pieces. How much did you break altogether on the two pieces?

A. We broke altogether on the two pieces; we broke a little over fifteen acres.

Q. A little over fifteen acres?

A. Yes, sir; more or less.

Q. How much of that breaking was done on section 26?

A. It was very near eight acres.

Q. And how much on section 35?

151 A. Well, there was, take the two together, there was probably fifteen acres; probably a little less than that; that eight acres, it might be a little more than that; I think there was more than there was on the other. Now, I am merely guessing this, I never measured it. I am just guessing it.

Q. That is all right; how many acres were there? Was it seven or six or four acres. I don't expect you can tell exactly; only I want to know something about it. I am not expecting you to be accurate as to the exact amount.

A. Well, that is all right. That is as near as I can get at it.

Q. Now, with reference to the house that was on the land, in which direction was that breaking from the house? Was it east or west, or north, or south?

A. The breaking was south of the house, of course.

Q. All of it? A. And east. Southeast of the house.

Q. Was any of it north of the house?

A. The first of the six acres was a little north of the house; that is, the breaking in 1867; but not in 1868.

Q. But in 1868 all of the breaking was south of the house?

A. Yes, sir; in 1868 it was south of the house. Mind you, I said east and by south.

Q. It was not north of the house?

A. It was not north of the house. The house was within twenty rods of the west line of the eighty.

Q. It was all south? A. Yes, sir.

Q. None of it north? A. No, sir.

Q. You said you broke in company with somebody;

152 who was it you broke in company with?

A. John Carr.

Q. John Carr?

A. Yes, sir. He is here now. I don't know his middle name. We call him John Carr.

Q. When did you fence this pasture you say you fenced on that land?

A. I can't really swear to that. To the best of my judgment, it was in 1874. I fenced fourteen acres. Now, I am not really positive about it, Mr. Dunn, it was either 1874 or 1875. It was either 1874 or 1875, I fenced fourteen acres.

Q. With reference to the breaking, where was this fencing of the land in 1874 or 1875? In what direction was the pasture? A. The pasture, it was right west of the breaking.

Q. The pasture was west of the breaking on section 35?

A. Yes, sir; west of the breaking, on section 35.

Q. Now, in 1871, you said you broke some more?

A. Yes, sir.

Q. Where did you break that?

A. I broke that south of this tract.

Q. South of the fence?

A. No; not south of the fence. The fence was, about, I should judge, about 30 rods from the east line; and I broke right east of that fence.

Mr. Gilman: Was that south of what you broke in 1868?

Witness: It was south of what I broke in 1868. Yes, sir, It was south of what I broke there in 1868.

Mr. Gilman: And adjoining the tract that you broke in 1868?

Witness: Yes, sir. Joining the tract I broke in 1868.

Q. You say you allowed your cattle to run on the other part of it, did you?

A. I herded my cattle on the other part of the land:
153 the land was all vacant. It was used just for hay and pasture.

Q. It is a fact, isn't it, that that whole country was pretty near all vacant at that time? A. Yes, it was.

Q. There were very few neighbors at that time? A Yes, sir.

Q. Very few people round there, were there not?

A. Yes, sir; but part of the time my cattle were herded on that piece of land at home.

Q. At home?

A. Yes, sir. They would go for miles. We would fence them in at home part of the time, and take care of them.

Q. How many neighbors did you have, and how near were they to you in 1868, and from on until 1871?

A. Mr. Welden lived on the southeast of section 26; and Mr. McLaughlin cornered on the southwest of section 26-101-28.

Q. Who was the first man?

A. Mr. Weldon; he is here now.

Q. Mr. Weldon?

A. Yes, sir he was a resident; he was on the southeast quarter of section 26.

Q. Who else?

A. Mr. McLaughlin, he was on the west; he was on section 34, it cornered on section 26; and his land cornered on section 26.

Q. With the exception of these you have named, how many other neighbors were there in that neighborhood?

A. Some two or three. Mr. Caswell was on the north of me.

Q. Who else?

A. Mr. Demeree; he was on the northeast quarter of section 35 and lived there then. He came there before I did. He was there when I came there in 1867.

154 Q. There were not many neighbors in that country?

A. It was all settled in there in the north, but not in the south.

Q. In 1868, how was that?

A. In 1868, yes, and up to 1868; in 1867 when I came there neighbors were there north of me; but south of me it was vacant.

Q. There was a good deal of government land, wild land and railroad land?

A. There was railroad land; there was not much government land. There was railroad land.

Q. And some State land?

A. There was some State land; but very few pieces. There was no government land in there where I would be. There was a quarter, I think some two and a half miles north of me; but the fact [it], it was all occupied at that time. Most of the government land I saw at that time was occupied, at that time.

Q. Most of the government land was occupied?

A. Yes, sir.

Q. But there was railroad land, railroad land was there not?

A. I don't know. There was some railroad land they called it; but I didn't call it railroad land. I don't know whether you would call it railroad land.

Q. It was what you would call vacant?

A. I don't know whether you would call it railroad land; because it was outside of the railroad limits. I don't know

what land it was. It was outside of the railroad limits, I was informed at that time.

155 Redirect Examination

By Mr. Gilman:

Q. Was there any travel on that road in 1868, between sections 35 and 26?

A. There was not much travel; there was once in a while some travel; there was some travel on the road. They would travel along it in every shape. There was no fence there, and they would go over it in every shape, the nearest way they could go. Some would go on the section line, and some would not.

Q. Was there travel enough to make a path, so you could see where the road was?

A. There was wheel tracks, but not very much travel. The government corners were there, and you could see the wheel tracks. There was not much travel on that road.

Peter L. Welden, a witness of lawful age, produced and sworn on the part of the complainant, testifies as follows:

Examination-in-Chief

By Mr. Gilman:

Q. Where were you living in 1867 and 1868, Mr. Welden?

A. I was living in the town of Pilot Grove.

Q. In what county? A. Faribault County.

Q. In this State? A. Yes, sir.

Q. Had you taken up a claim there on government land?

A. Yes, sir; I had.

156 Q. What time did you locate there, what year?

A. I located there in the year 1866.

Q. In 1866? A. Yes, sir.

Q. How far was your place from the land that Mr. Donovan was located upon. A. It joined him.

Q. Joined him, in which direction?

A. He joined me on the west.

Q. Do you know when Mr. Donovan located there, located on the east half of the Southwest quarter of section 26?

A. He came there in 1867.

Q. He came there in 1867?

A. Yes, sir, and built; and moved on in 1868.

Q. Did you know him right along from the time he located there, all the time from the time he located there?

A. Yes, sir.

Q. Did you know of his plowing or breaking up, and putting a crop on the land in Section 35 which joined section 26?

A. Yes, sir.

Q. What year did he first do plowing on that tract of land, the east half of the northwest quarter of section 35, what year?

[Q.] I wouldn't positively say. I think it was in 1868. I wouldn't be positive as to that.

Q. Do you know about how much he broke up on that tract in 1868?

A. I should think it was four or five acres, or more.

Q. Do you recollect whether he put a crop of sod corn on it, on that year, or not, a crop of sod corn?

A. He put in some sod corn.

157 Q. Do you know of his subsequently breaking up more on that tract in section 35, adjoining what he broke up in 1868? A. Yes, sir I do.

Q. Do you know about how much he broke up altogether in this tract on section 35? A. No; I do not.

Q. Do you know whether he put in a crop every year on this breaking this land that he broke up, on this tract in section 35, right along, until the time he was dispossessed, away along in 1885? A. Yes, sir.

Q. Did you ever notice a piece of land, half an acre or so, that he had under fence and cultivation for garden purposes, which was south of what he had plowed up and put into crop, on that tract in section 35?

A. Yes, sir. The first year he put it into a garden.

Q. How is that?

A. The first year he put in some garden there.

Q. Did he use that for cultivation every year?

A. Yes, sir; put it in as a garden.

Q. Did he use it for garden stuff after that, if you know? How did he use it?

A. Yes, sir; he did one year for garden stuff, that I know of.

Q. Was it fenced in?

A. No, sir; not the plowed ground. It was not fenced.

Q. No, but I mean, this garden spot. A. No, sir.

Q. Did you know of his having some of the ground fenced for a pasture? A. Yes, sir.

158 Q. Do you know about how much he had fenced there? A. No, sir; I do not.

Q. Do you know of his cutting hay on this ground every year, right along? A. Yes, sir.

Q. Was that eighty acre tract in section 35 used and occupied and cultivated by him every year, as a part of his farm, in connection with the tract in section 26? A. Yes, sir.

Q. And was it occupied and cultivated every year until he was put out of possession? Do you recollect when he was put out of possession by Thompson? A. No; I do not.

Q. Was it so occupied and cultivated by him until he was put out of possession? A. Yes, sir

Q. Were you living on that tract that was adjoining him all this time? A. I was, part of the time.

Q. Part of the time? A. Yes, sir.
Q. Are you living on it now A. No, sir.
Q. How long did you live there?
A. I lived there about seven or eight years, somewhere along there seven or eight years.
Q. How long? A. Seven or eight years.
Q. From what year did you live there seven or eight years?
A. 1866. It may have been a little longer than that. I think it is about that time.
Q. Where did you move to then?
A. I moved over to Elmore.
Q. How far from this Donovan tract?
A. It is about three miles.
Q. After you moved there did you still live on the farm?
A. Yes, sir.
159 Q. After you moved away from this tract that adjoined him, were you back and forth, so as to see the Donovan place, and what he had under cultivation?
A. Yes, sir. I used to go back and forth to Chain Lake.
Q. You knew of his living on and cultivating these two tracts, right along? A. Yes, sir.
Q. You did? A. Yes, sir.

Cross Examination.

By Mr. Dunn:
Q. Where do you live now, Mr. Welden?
A. I live in Elmore, town of Elmore.
Q. How far from Mr. Donovan?
A. Well, it is about three miles, I should think.
Q. Mr. Donovan, you say, came into that neighborhood in 1867. A. Yes, sir.
Q. When did you first see him there?
A. That was in 1866, March, 1866.
Q. You first saw him there in 1866?
A. No; I thought you asked me when I came there.
Q. No. When did you first see Mr. Donovan there?
A. 1867.
Q. What month was it, do you remember?
A. I don't know. I don't remember now. It was along in the fall late, late in the fall.
Q. The fall of 1867? A. Yes, sir.
Q. Late in the fall, you first saw Donovan there?
A. Yes, sir.
Q. Where did you see him?
A. I saw him on his place, to work.
160 Q. He was on the place where he lives now, at that time? A. Yes, sir.
Q. What section is his house on? A. Section 26.

Q. Your farm adjoined his, did it? A. Yes, sir.
Q. Which way? A. On the east.
Q. What section is your farm on? A. Section 35.
Q. Were you on the same quarter section that this land in dispute is on, the same quarter section?
A. No; I was mistaken about it; I was on section 26.
Q. You were on section 26?
A. I think it was section 26.
[—] Then your farm did not adjoin this farm on section 35? A. It cornered it a little.
Q. It didn't join it? A. No, sir.
Q. When did he build his house, on that place there?
A. That was in 1867; he finished it in 1868.
Q. You say he finished it in 1868? A. Yes, sir.
Q. Are you sure about that; that he commenced his house in 1867? A. Yes, sir.
Q. You are positive, are you, about that? A. Yes, sir.
Q. Did you know that the land he lived in on section 35 was claimed to be railroad land, when he lived there on it?
A. No, sir.
Q. When did you first learn that?
A. I learned that about the time that Thompson was on it.
Q. You didn't know it was railroad land?
A. No, sir. I thought it was a homestead all the while.
Q. Up to 1885 you thought it was a homestead?
161 A. Yes, sir.
Q. For twenty years you thought it was a homestead. It is twenty years from 1865 to 1885; you thought it was a homestead all that time?
A. I didn't think much about it, until they had a lawsuit over it.
Q. You didn't know anything about it until then?
A. No, sir.
Q. How did you know the land that Mr. Donovan claimed?
A. Because—
Q. Don't you know he only got a patent some time in the seventies for the land in section 26? It was not on the assessment roll, didn't you know that?
A. No, sir. I did not.
Q. Didn't you know that his land was in dispute, that the south eighty was in dispute?
A. I didn't know anything about it until the suit. I didn't know anything about it.
Q. Didn't you know it was in dispute, before Thompson came there in 1885?
A. No, sir. I didn't know anything about it, until Thompson came there; when I saw they had a fuss over it. I didn't

know anything about the land. He claimed to own it, and I supposed he owned it.

Q. You supposed he owned it? A. Yes, sir.

Q. You testified to Mr. Gilman that Mr. Donovan put a crop in that land every year until he was evicted. Do you know anything about his being evicted, being put out of possession? A. Yes, sir.

Q. Did you know anything about his being put out of possession? A. I heard he was.

162 Q. You heard he was? A. Yes, sir; at that time.

Q. Whom did you hear put him out of possession?

A. I just merely heard talk about it; that is, when Mr. Thompson was there.

Q. You heard that Mr. Thompson won the lawsuit?

A. Yes, sir. That is all.

Q. That is all? A. Yes, sir.

Q. You say up to the time you heard about Donovan's lawsuit, he cropped that piece of land up to that time?

A. A short time before that.

Q. Some time before that? A. Yes, sir.

Q. Some years before that?

A. Before Thompson and he had the lawsuit; some time before that. I can't say how long it was.

John Carr, a witness of lawful age, produced and sworn on the part of the plaintiff, testifies as follows:

Examination in Chief

By Mr. Gilman:

Q. Mr. Carr, did you know Michael Donovan in 1867 and 1868? A. Yes, sir.

Q. Did you know the tract of land on which he settled, in Pilot Grove, in 1867 or 1868? Do you know the tract of land on which he settled? A. Yes, sir.

Q. What year do you know that he settled there?

162½ A. On this tract of land?

Q. Yes. The tract of land that he lived on thereafter, and lives on at the present time?

A. I have no recollection of the year he settled on it.

Q. Where were you living at the time you first knew of his being there and having settled there?

A. I was living on section 15, Pilot Grove.

Q. How far was that from his place?

A. Well, it is a mile or a mile and a half. It was just exactly two miles.

Q. Two miles?

A. Yes, sir; that is, from our land to his, to a corner of his.

Q. You lived with your father at that time, did you?

A. Yes, sir.

Q. He had taken up a claim on which he was then living?
A. My father, do you mean?
Q. Yes. A. Yes, sir.
Q. Did you and Mr. Donovan do plowing together, in 1868?
A. Yes, sir.
Q. On whose land did you plow?
A. We plowed on Mr. Donovan's land. It was supposed to be Mr. Donovan's land.
Q. And what other land? A. And my father's land.
Q. You didn't plow for any one else? A. No, sir.
Q. You plowed together, did you?
A. Yes, sir. Plowed together.
Q. In what year did you first plow for Mr. Donovan?
A. In 1868.
Q. Did you do plowing in 1868, on the east half of the Northwest quarter of section 35, for him that year?
163 A. That is, this disputed land?
Q. Yes; this disputed land? A. Yes, sir.
Q. Did you know where the section line was between section 35 and section 26? A. Yes, sir.
Q. How much in the year 1868, how many acres, according to your recollection, did you plow for Mr. Donovan, on the south side of the section line, on this tract that is in dispute?
A. That I couldn't say, to a certainty.
Q. Of course, you can't say to a certainty; but about how many acres?
A. There was from five to ten acres, somewhere. Somewhere from five to ten acres.
Q. Do you recollect how many days you were to work there, plowing with him then?
A. No, sir, I couldn't tell you that.
Q. Do you know or recollect whether he put a crop of sod corn, or any other crop, on that, in 1868?
A. I couldn't say as to that.
Q. You couldn't say as to that? A. No, sir.
Q. Do you know of his having plowed more on that tract south, and adjoining what you broke up for him on that tract, in 1868, and subsequent years?
A I know of his having more land in cultivation, after that.
Q. You didn't help to plow it though?
A. No, sir. I didn't help to plow it.
Q. Do you know about how many acres he had under cultivation altogether? A. Altogether, I couldn't say, no sir.
Q. On this tract, in section 35?
164 A. I don't know how many acres, no, sir.
Q. But you know he had plowed up more, and had more under cultivation than what you helped him to plow in 1868? A. Yes, sir.

Q. Do you recollect anything about there being half an acre south of that he had under cultivation, at the north end of this tract in section 35, on which he raised garden stuff?

A. I have no recollection about it.

Q. You have no recollection about it? A. No, sir.

Q. Do you recollect of his having any of this land on section 35, that he claims, fenced in for the purpose of pasture?

A. That year, yes.

Q. Do you recollect that he had some fenced?

A. At any time?

Q. Yes. A. No, sir; I don't.

Q. You never saw any fence that he had on the land?

A. I have no recollection of it.

Q. You have no recollection of it? A. No, sir.

Q. Do you know whether he cut hay on that land?

A. He did.

Q. Did he cut hay every year?

A. Well I couldn't say. I couldn't answer that question, because the country was large at that time. I presume he cut hay wherever he had a mind to.

Q. How long did you live on this place where your father was, right along, how many years? A. With my father?

Q. Yes.

A. Somewhere in the neighborhood of fifteen years. I was fourteen years old when I came there, and I stayed there until I was thirty-three; about fourteen or fifteen years.

Q. During that time you frequently saw Mr. Dono-
165 van, and were acquainted with what he was doing, particularly in connection with his location? A. Yes, sir.

Q. Was he every year cultivating more of that land in section 35, that is, the land in dispute? A. Yes, sir.

Q. Did he have it under the plow? A. Yes, sir.

Q. What was that used for, was it cropped, or was it used for pasture, or for cutting hay?

A. It was used for pasture, or for cutting hay.

Q. Do you know anything about a drain through a part of this tract? A. Of this disputed tract?

Q. Yes. A. Yes, sir.

Q. To drain the surface water off, is that? A. Yes, sir.

Q. Do you know who kept that drain open, and who has kept it open up to the present time?

A. I know of keeping it open; I know it is kept open up to the present time. I don't know who is doing it.

Q. If you don't know about that, it doesn't matter?

A. I don't know who is doing it. I know Mr. Donovan has done some; but whether he has done it lately, I don't know.

Cross-Examination

By Mr. Dunn:

Q. You assisted in breaking this land on section 35, you say, did you? A. Yes, sir.

Q. In 1868? A. Yes, sir.

Q. You were a boy about fourteen years old, you said, then? A. Yes, sir.

Q. You broke on your father's place? A. Yes, sir.

166 Q. And then broke some with Mr. Donovan?

A. No. Just give me time; it is a long time ago. I want to think about it. I was more than fourteen years old.

Q. I thought you said you were fourteen years old?

A. I came here when I was thirteen.

Q. It is immaterial. You were a boy?

A. Yes, sir. I was a boy of fourteen or fifteen.

Q. You did break with Mr. Donovan? A. Yes, sir.

Q. Where, and on what section did you break in 1868, for Mr. Donovan? A. In 1868?

Q. Yes.

A. Well, I broke on two sections. We broke on section 26 and section 35.

Q. On sections 26 and 35?

A. Yes, sir. We broke on the eighty that he lives on, and on this disputed eighty.

Q. Where did you commence to break?

A. We commenced on section 26.

Q. On section 26? A. Yes, sir.

Q. Did you break with the furrows running east and west, or north and south? A. East and west.

Q. East and west? A. Yes, sir.

Q. Did you see the road there at that time?

A. I couldn't say.

Q. What is that? A. I couldn't say.

Q. Did you leave out any strip for a road between these two breakings? A. I couldn't say as to that.

Q. What is that? A. I couldn't say as to that.

167 Q. What is your best memory upon that?

A. With regard to the road, do you mean?

Q. Yes. Whether there was a road there at that time.

A. Well, now, there was a road.

Q. Where did it go on that land, and which way?

A. It went round a slough.

Q. Went round a slough? A. Yes, sir.

Q. There is a slough right there on that land?

A. Yes, sir. There is a slough right there, but not on the land where we were breaking.

Q. Was there pains taken by you and Mr. Donovan to leave out a road between these two breakings; or did your two breakings come together? A. I don't know as to that.

Q. You don't know as to that? A. No, sir.

Q. Your memory does not serve you as to that? A. No, sir.

Q. How do you know that you were on section 35 at all?

A. How do I know?

Q. Yes.

A. The only way I can answer that question, and testify to it, is, I know we broke over a knoll there was there, pretty near to the top of a knoll that is across this line.

Q. Across this line?

A. Yes, sir. Where the line is now.

Q. You know where the line is now? A. Yes, sir.

Q. How near to that line did you break?

A. How near to the line?

Q. Yes.

A. If my memory serves me right, as I recollect it, we broke right on to the line there.

Q. Did you break the line up?

A. No, sir; I don't know as to that.

168 Q. You said you broke right on the line. What do you mean by that? What do you mean to be understood by saying that you broke right on the line?

A. In those early days we were not looking for section lines.

Q. I understand it. Recollect I was there. I know all about it. The fact is, you broke that land the same as any other land; you paid no attention to the line?

A. I don't know whether we broke on the line or not.

Q. Now, how do you know you broke on section 35?

A. I know the line we broke. I know the land, and I know where the line is now. I was on section 35; I didn't know it as section 35 at that time.

Q. Then you didn't know anything about the section lines at that time? A. Yes, sir; I did.

Q. You didn't know whether it was on section 35 or section 45?

A. No, sir. I didn't know whether it was on section 35 or section 45.

Q. And you didn't know but what you were on section 26?

A. I didn't know but what I was on section 26.

Q. You didn't undertake to make any distinction between section 35 and section 26, did you, when you broke?

A. No, sir.

Q. You broke it all solid together?

A. I couldn't tell you. I couldn't tell you as to that. I don't know exactly whether we left a strip there, or whether

the whole breaking joined, as we went south. We commenced north, and broke south.

169 Q. You commenced north, and broke south?

A. Yes, sir.

Q. And you can't swear now exactly, whether you left a strip, or not, can you? A. No, sir.

Q. You don't think you did, do you?

A. No. I don't think we did.

Q. When did you first know of any buildings being built on section 35? A. I never knew of it.

Q. Are there not any buildings there now? A. No, sir.

Q. There are not? A. No, sir.

Q. No buildings on section 35? A. No, sir.

Mr. Gilman: No; there is no building on section 35.

Mr. Dunn: Yes, there are. Erichsrud had a house there on section 35.

Witness: No, sir.

Q. He didn't build that house there? A. No, sir.

Q. Never built a house there. A. No, sir.

Q. Well, perhaps not. Perhaps that is right. Have you known of more being broken, more land being broken there?

A. After I helped Mr. Donovan to break?

Q. Yes. A. Yes, sir.

Q. How much. A. I don't know.

Q Altogether, how much have you known to be broken up?

A. I couldn't say.

Q. How many acres. A. I don't know.

Q. Isn't it pretty nearly all of it broken up?

A. No, sir; it is not all broken up.

170 Q. All that is breakable is broken up? A. No, sir.

Q. Do you know who broke it up?

A. No, sir; I don't.

Q. Did Mr. Thompson break any land there?

A. I think so.

Q. Did Mr. Erichsrud break any land there?

A. I don't know. I don't think so.

Q. You don't think he did? A. No, sir.

Q. The buildings that Mr. Erichsrud built are on the adjoining eighty?

A. I have no recollection of Mr. Erichsrud building any buildings at all.

Q. Did Mr. Thompson build any buildings at all?

A. There was a shack, or a house there; I don't know whether he built it, or whether it was on there when he got it.

Mr. Gilman: On this land in dispute?

Witness: No, sir. Not on this land in dispute. It may be Thomas Demeree's place.

Mr. Dunn: I guess that is right. There are no houses on that particular eighty.

Witness: No, sir.

Harry Schilling, a witness sworn on the part of the complainant, testifies as follows:

Examination in Chief

By Mr. Gilman:

Q. Did you at one time move onto a tract of land in
171 Pilot grove, Faribault County, Minnesota. A. Myself?

Q. Yes, or did your father's family, or whoever was there?

A. My father did. I was with him part of the time.

Q. What year? A. In the fall of 1871.

Q. How far did you locate from the land on which Mr. Donovan was living?

A. I think it was about a mile and a half.

Q. Had you known Mr. Donovan prior to finding him there?

A. I had seen him in the summer a few times. I knew him by sight, that is about all.

Q. After you moved there you became acquainted with him, and knew his place?

A. Yes, sir. I knew him better afterwards.

Q. Do you know of his having under cultivation, after you became acquainted with him, this land in section 35; that is, the east half of the northwest quarter of section 35?

A. Well, I knew there was a little cultivation there; yes, sir.

Q. On the south side of the road?

A. Yes; south of where the road is now.

Q. South of where the road is now? A. Yes, sir.

Q. You know where the road is now?

A. Yes, sir. I know where the road is now.

Q. Did you know of his having had under cultivation land south of where the road is now? A. Yes, sir.

Q. In 1871?

A. Yes, sir. That is, I don't know whether he had any. I knew there was land under cultivation, that I supposed to be Donovan's.

Q. Do you know about how many acres there were under cultivation, where the road is now? A. No.

172 Q. How many years were you acquainted with Mr. Donovan, and with what he was doing in connection with his place there, after you moved there in 1871?

A. I know he lived there since. I was gone a year or two, or three years at different times, away from there; he was always there when I got back.

Q. He was always living there when you were back again?

A. Yes, sir.

Q. Do you know of his having under cultivation portions of land on the south side of what is now the road, the traveled road, on section 35? A. Yes.

Q. Did he have it cultivated every year?

A. I couldn't tell.

Q. Whenever you were there? A. Whenever I was there.

Q. You have noticed that? A. Yes, sir.

Q. Were you back and forth there? A. Yes, sir.

Mr. Dunn: When do you mean? When were you back and forth there?

Witness: I knew afterwards that Mr. Donovan was cultivating it.

Mr. Dunn: I thought you said you didn't know him at that time.

Witness: I knew afterwards that Mr. Donovan was cultivating it.

Mr. Dunn: You are referring to a time subsequent to that now, are you?

Witness: Yes, sir.

173 Q. Generally speaking, as soon as you knew that Donovan was cultivating it, you knew of his having put in a crop there, every year, right along, did you not?

A. Yes, sir; I did.

Q. Whenever you were round there?

A. Yes, sir. Whenever I was round there.

Q. Can you give an estimate of the number of acres that he had under cultivation, south of where the road is now, on this tract in section 35?

A. I could guess at it. That is as near as I could tell.

Q. Give a guess at it.

A. It may have been somewhere in the neighborhood of five acres, and probably more.

Q. Do you mean in 1871?

A. No. In 1871, I don't recollect he ever had broken anything, except a little tract. He seemed to have a post and rail fence there, a kind of a snail fence, whatever was on it. That is all I recollect in 1871 he ever broke there.

Q. When do you recollect of seeing any acres under cultivation there first?

Mr. Dunn: The five acres?

Mr. Gilman: Aside from this little piece that you spoke of.

A. Well, it would be very hard for me to tell just when that would be.

Q. Do you know of his having any of the land under fence, for the purposes of pasture? Did you ever see any
174 fence on the land?

A. Yes, sir. I have seen a fence on that land, a post and wire fence.

Q. Do you know about how many acres were fenced in?

A. No. I couldn't say how many acres.

Q. Do you know of Mr. Donovan cutting hay on that land?

A. No, I do not.

Q. Were you at home most of the time for several years, or were you off and away?

A. No. I was not at home, only once in a while. I was to home a great deal. There was a few years I think I was to home.

Q. When you were at home, was Mr. Donovan in the occupation and cultivation of that tract of land on section 35, the tract in dispute? A. I couldn't tell you about that.

Q. But you know of his having had some plowed up on the land?

A. Yes, sir; later on, after 1871, later on, two or three or four years, I knew that Donovan was working the land across the road there.

Cross-Examination

By Mr. Dunn:

Q. You say you came there in 1871? A. Yes, sir.

Q. When you came there, you say you don't know anything about his [his] working on that land across the road from this place. A. Not a great deal.

Q. Was there any indication of his working on that land south of the road, when you came there in 1871?

A. Well, I couldn't say about that.

Q. How did it look, as to the number of acres that
175 were broke there, was there much broke there south of the road in 1871?

A. I will tell you. South of the road in 1871, I knew there was some broke at that time; but I don't know, and I couldn't tell you how much it was. I didn't know in 1871 that Mr. Donovan was working that land.

Q. You didn't know in 1871 that Donovan was working that land? A. No, sir.

Mr. Gilman: But it was being worked by somebody?

Witness: It was being worked by somebody, south of his house.

Q. South of the house, or south of the road?

A. South of the house, and south of the road.

Q. Was there any road there then? A. I don't know.

Q. Put your thinking cap on, and think whether there was any road, and whether the breaking didn't go right straight south, without any break, or anything for a road, until after 1871? A. I don't know as to that.

Q. After 1871, there began to be a road there?

A. I don't know. The road might have been there years before.

Q. I mean the traveled road; I don't mean, a laid out road?

A. At that time; I don't know.

Q. How old were you in 1871? A. Nine years old.

Q. You were not old enough to know very much about it?

A. No, sir. I didn't pay very much attention to it.

Q. I understand. You couldn't pay much attention to it; that is true. But along afterwards, you noticed that he had four or five acres broken, south of that road?

176

A. That, or more; I couldn't say.

Q. You say you had seen some fencing on the land; you don't know who put that fencing there?

A. No, sir. I didn't see the man that put the fencing there.

Q. Do you know whether this land is not pretty near all broken up now, the eighty acres south of the road?

A. It is pretty near all broke up.

Q. Do you know who broke it up? A. No, sir; I don't.

Q. You are not living in that neighborhood now?

A. I live on section 34 now.

Q. Do you know whether Thompson broke it up?

A. No, sir. I do not.

Redirect Examination

By Mr. Gilman:

Q. In after years, you knew, and you know now, where the road runs between section 35 and section 26, do you not?

A. Yes sir. I know now where that road runs.

Q. In looking back you know that there was land broken, in 1871, when you first noticed it, south of where that road is now? A. Why, sure, yes sir.

Q. But how many acres you don't know?

A. No, sir. I do not.

Q. Or how much was afterwards broken?

A. No, sir. I do not.

177 United States Circuit Court, District of Minnesota, Third Division.

United States of America, Complainant,

v.

Chicago Milwaukee & St. Paul Railway Company; Southern Minnesota Railway Company, Thomas Thompson; O. C. Erichsrud, et als., Defendants.

Stipulated Facts.

For the purpose of the trial of the above entitled action, the following facts are stipulated, subject to any objections thereto as irrelevant and immaterial, and subject to the right of introducing other testimony relating thereto, and to the establishment of other facts:

178 I.

That the Act of Congress approved July 4, 1868, referred to in the Bill and in the Answer, made a grant of lands to the State of Minnesota to aid in the construction of a railroad, which Act is hereby referred to for the particulars thereof.

II.

That the Southern Minnesota Railroad Company was a corporation organized under the laws of Minnesota, with power and authority to construct such line of railroad as was existing at the date of said Act of Congress, and that the Legislature of Minnesota on the 25th day of February, 1867, transferred said land grant to said railroad company, subject to the provisions of said Act of Congress, and to the provisions of said legislative act, which legislative act is also hereby referred to for the particulars thereof.

III.

That the tract of land in dispute, to wit, the East Half ($E\frac{1}{2}$) of the Northwest Quarter ($NW\frac{1}{4}$) of Section Thirty-five (35), Town One Hundred One North (101), Range Twenty-eight (28), in Fairbault County, Minnesota, is within the indemnity limits of said land grant for said railroad, as determined by its Definite Location, which became effective February 25th, 1867, under the legislative act aforesaid; and that the amount of 179 lands realized from the Congressional grant aforesaid was much more than eighty (80) acres less than the amount of a full grant as defined by the Congressional Act aforesaid.

IV.

That before the passage of said Act of Congress, to wit, June 21, 1866, one Luman Barclay, a person duly qualified to acquire lands under the Homestead law of the United States, duly made entry as a homestead of said tract above described in Section Thirty five (35), together with an adjoining tract in Section Twenty six (26), viz., The East Half (E½) of the Southwest Quarter (SW¼), of the same town and range, which entry remained in full force and operation until January 14, 1868, when the same was duly cancelled by the Land Department at Washington, on account of its abandonment by Barclay.

V.

That on the Sixth day of June, 1868, the defendant Michael Donovan, a person duly qualified to acquire land under the homestead laws of the United States, duly entered as a homestead the said East Half (E½) of the Southwest Quarter (SW¼), Section Twenty six (26), Town One Hundred One North, (101), Range Twenty eight (28) West, and thereafter, to wit, on the 18th day of May, 1875, duly made final proof of his occupancy and improvements of said tract of land in said Section Twenty six (26), in compliance with the homestead laws, and
180 duly received the usual certificate thereof and a Patent for said land, dated July 1st, 1875.

VI.

That on the 29th day of November, 1870, and not before, the said Southern Minnesota Railroad Company selected said tract of land in said Section thirty five (35), in lieu of land lost in the granted limits under said Act of Congress; which said tract of land was certified to the State of Minnesota by the Land Department, March 25th, 1871, for the benefit of said Railroad Company; and on the 8th day of August, 1871, the State of Minnesota conveyed by deed said tract of land to the said Railroad Company.

VII.

That the said Southern Minnesota Railroad Company, in March, 1868, made a certain mortgage or trust deed to Albon P. Mann and S. R. Ruggles as trustees, to secure the payment of an issue of its bonds, upon its railroad appurtenances and all other property including said land grant, and all lands acquired or to be acquired thereunder; which said mortgage was duly foreclosed by said Trustees in the United States Circuit Court of Minnesota by suit commenced in 1872, in which suit a Final Decree was rendered by said Court, in May, 1874, ordering a

sale of said mortgaged property, in pursuance of which Decree a sale of said mortgaged property was duly made by a Master in Chancery of said Court in February, 1877, to A. P. Mann and H. H. Cammann in trust for the bondholders secured by said mortgage, and thereafter, on the 3rd day of March, 1877,

181 the said purchasers under the laws of the State of Minnesota, duly organized as a new corporation by the name of the Southern Minnesota Railway Company, and conveyed to said Railway Company all of said property so purchased at said foreclosure sale.

VIII.

That on the 26th day of June, 1883, the said defendant Michael Donovan, duly applied at the proper Local Land Office to, enter as an adjoining farm homestead the said tract of land in said Section Thirty five (35), which application was rejected upon the ground that the land so appiled for had been certified to the State of Minnesota for the said Southern Minnesota Railroad Company, from which refusal the said Donovan duly appealed to the Commissioner of the General Land Office, where said matter is still pending and undetermined.

IX.

That on the 5th day of January, 1885 the said Southern Minnesota Railway Company, by contract in writing, agreed to sell said tract of land in question in said Section Thirty five (35), to one A. Boysen, for the sum of $480.00, $94.87 being paid down, the balance to be paid in yearly installments of $80.00, which said contract is attached to the Answer of said Railway Companies as Exhibit "A," and is found on page 46.

182 That the said Boyesen, on the 6th day of January, 1885 duly assigned said contract to one N. C. Fredericksen, which assignment is attached to said answer and found on page 54;

That the said Fredericksen on the first day of April, 1885, duly assigned said contract to the defendant Thomas Thompson, which assignment is attached to said answer and found on page 52.

That the said Thompson, on the 3rd day of February, 1888, assigned said contract to the defendant O. C. Erichsrud, which assignment is attached to said answer, and found on page 50.

That the said Erichsrud paid the balance due upon said contract and received a warranty deed for said land from said Southern Minnesota Railway Company, on the 20th day of March, 1888.

X.

That on February 14, 1889, the Commissioner of the General Land Office addressed a communication to the Secretary of the Interior relating to the application of said Donovan for the institution of proceedings under the Act of Congress of March 3, 1887, which communication is hereto attached and marked Exhibit "B" hereof.

XI.

That on April 1st, 1889, the Secretary of the Interior addressed a communication to the Commissioner of the General Land Office in relation to said application of said Dono-
183 van, and in reply to the letter of said Commissioner of February 14th, 1889, which communication of the said Secretary is hereto attached and made a part hereof, marked Exhibit "C."

XII.

That on April 12th, 1890, the Commissioner of the General Land Office addressed a letter to the Secretary of the Interior, informing him that a demand for the reconveyance of said land had been made as directed by him, which letters is hereto attached and made a part hereof, and marked Exhibit "D."

XII.

That on April 16, 1890, the Secretary of the Interior addressed a letter to the Attorney General, relating to said matter, which letter, or a copy thereof, is hereto attached and Marked Exhibit "E," and made a part hereof.

XIV.

That in 1885, the defendant Donovan commenced an action against the defendant Thompson, in the District Court of Faribault county, Minnesota, alleging that said Thompson had wrongfully and unlawfully taken possession of the tract of land involved in this suit, and excluded him, said Donovan, therefrom, and demanding judgment for damages against him on account of said wrongful acts, and to be reinstated in the pos-
session of said land; that such proceedings were had in
184 said action, that on March 24, 1887, said Court decided that the said Donovan had no title to said land, nor right to the possession of the same, and that the said Thompson had a right to the possession of the same under the said Boysen contract, which had been assigned to and was held by the said Thompson for the purchase of said land, and judgment was accordingly ordered and entered in said court against the said Donovan in said action on the 4th day of Jan-

uary, 1888, which judgment was never vacated, modified, reversed or appealed from.

XV.

That since the commencement of this action, the said O. C. Erichsrud has departed this life intestate, leaving surviving him his widow, Anna Erichsrud, and Addie J. Erichsrud, Mabelle H. Anderson, nee Erichsrud, Julia P. Remington nee Erichsrud, his children and only heirs at law, all of whom on the 24th day of May, 1899, joined in a warranty deed conveying said tract of land involved in this suit to one Louis K. Woodwick, and that the said widow and children of the said O. C. Erichsrud and the said Woodwick have by Supplemental Bill been made defendants in this action, and have appeared and answered therein.

Dated, October 30, 1901.

185 J. M. GILMAN.
Special Counsel for Plaintiff,
BURTON HANSEN and W. H. NORRIS,
Solicitors for Railway Companies, Defendant.
ANDREW C. DUNN,
Solicitors for Defendants,
Anna Erichsrud,
Addie J. Erichsrud,
Mabel H. Andersen, nee Erichsrud,
Julia P. Remington, nee Erichsrud,
Louis K. Woodwick.

B. W. J. D. Department of the Interior. L. L. M.

F. General Land Office.
Washington, D. C. May 14, 1901.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed paper dated February 14, 1889, addressed to the Hon. Secretary of the Interior, is a true and literal exemplification of the original of record in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

[Seal United States General Land Office]

BINGER HERMANN,
Commissioner of the
General Land Office.

186 GOVERNMENT EXHIBIT "B."

F. Department of the Interior.
General Land Office.

Address only the Commissioner of the
General Land Office.

Washington, D. C., Feby. 14, 1889.

Hon. Secretary of the Interior,
Washington, D. C.

Sir: I have the honor to transmit herewith for your consideration the papers relating to the application of Michael Donovan for the institution of proceedings under the Act of March 3, 1887, (24 Stat., 556), to restore to the United States title to the E½ NW¼ Sec. 35, Town 101 N., Range 28 W. 5th p. m., in the Worthington land district, Minnesota, with report and opinion as follows:

The land is in the 20-mile (indemnity) limits of the Southern Minnesota Railway Extension grant of July 4, 1866, (14 Stat., 87.) The withdrawal of lands on account of the grant along that portion of road opposite the tract described was ordered by office letter of August 23, received at the district land office Sept. 10, 1866.

The official records show that Luman Barkley made homestead entry No. 4347, June 21, 1866, for E½ SW¼ Sec. 26, and E½ NW¼ Sec. 35, which was canceled Jany. 14, 1866.

187 On June 6, 1868, Michael Donovan, (the petitioner) made homestead entry No. 5297 for the East Half (E½) Southwest Quarter (SW¼) Sec. 26, upon which final certificate No. 3568 was issued May 18, 1875, followed by Patent July 1, 1875.

The tract in odd section was selected on account of the grant, and certified to the State of Minnesota for the benefit of the Railway Company March 25, 1871.

Donovan's petition was filed in this office by Hon. John Lind April 20, 1888, and by letter of July 9, 1888, the attorney representing the railway company in this city was notified of the same and allowed thirty days within which to show cause why the prayer of the petitioner should not be granted. The company's response was filed December 6, 1888, and although not presented within the time prescribed, it is forwarded herewith.

The basis of Donovan's petition is his own alleged settlement upon, and occupancy and improvement of the land prior to and at the dates of selection and certification of the same on account of the railway grant, and the exceptance of the same

from the operation of the withdrawal by the subsistence at that date of Barkley's entry.

There can be no question that the land was excepted from the withdrawal. Upon the cancellation of Barkley's entry the tract became subject to selection on account of the grant or to the entry under the preemption or homestead laws by the first legal applicant.

188 Donovan alleges, and his statement is corroborated by the then register of the local land office, that at the time of making his homestead entry described above he applied for all of the land formerly covered by Barkley's entry, but eliminated from his application the tract in odd section upon being informed that it was railroad land, and made the entry as described above. He also alleges that he had improvements upon and was occupying the land prior to 1870, and has continued in occupancy of the portion improved ever since.

I am of the opinion that the petitioner waived his claim to the tract in odd section by eliminating the same from his homestead application and making entry for the land in section 26; that when he made the entry No. 5297 he exhausted his right of entry under the homestead law, and that he was not in a position to assert a legal claim to the land in section 35 when it was selected and certified on account of the grant.

No claim for the land appeared upon the official records when it was selected and certified for railroad purposes, and if all of Donovan's allegations respecting occupancy and improvement of the land at those times be admitted I cannot see how such acts could operate to defeat the grantee's right of selection as they were mere acts of trespass without color of legal right.

I am therefore of the opinion that the land was not erroneously certified on account of the grant; that the facts alleged by Donovan are not sufficient to warrant the institution
189 of proceedings to restore the title, and that the prayer of the petitioner should be denied.

The attorney for the railway company, Mr. Lind and Donovan will be informed respecting this action.

Very respectfully,

S. M. STOCKSLAGER,
Commissioner.

Indorsed: Department of The Interior. L. & R. R. Div. 3537. Received April 14, 189..

Department of the Interior,
General Land Office,
Feby. 14, 1889.

Commissioner forwards to Secretary of the Interior papers relating to petition of Michael Donovan for proceedings under Act of March 3, 1887, for restoration of title to the E. ½ N. W. ¼ Sec. 35, Town. 101 N. range, 28 W. 5th P. M. Minnesota.

4
21666. Com'r to Secty.
Feby 14, 1889.
B.

C. 7-6515. S. S. M.
F.
E. I. S.

Department of the Interior.
General Land Office.
Washington, D. C., March 14, 1901.

I, Binger Hermann, Commissioner of the General Land Office do hereby certify that the annexed copy of a letter from the Secretary of the Interior to the Commissioner of the General Land Office, dated April 1, 1889, is a true and literal exemplification of the original letter on file in the office.

In Testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed at the City of Washington, on the day and year above written.

[Seal U. S. General Land Office.

BINGER HERMANN,
Commissioner of the General Land Office.

GOVERNMENT EXHIBIT "C."

Exd.
H. D. L.
M. M. C.

Department of the Interior,
1296—'89. Washington,
April 1, 1889.

In re Application of Michael Donovan for institution of proceedings under Act of March 3, 1887.

The Commissioner of the
General Land Office Sr.

Sir: I have before me the report of your office of the 14th Feby., adverse to the application of Michael Donovan, for the institution of proceedings under the act of March 3, 1887 (24 Stat., 556), to restore to the United States title to the E. ½ of the N. W. ¼ of Sec. 35, T. 101 N., R. 28, Fifth P. M., Worthington, Minnesota, and asking to be reinstated to his right to make homestead entry of said tract.

This tract is within the twenty miles indemnity limit
191 of the Southern Minnesota Railway Company. The withdrawal of lands on account of the grant was made September 10, 1866, and at said date the tract in controversy, together with the E. ½ of the S. W. ¼ of Sec. 26 was embraced in the homestead entry of one Lyman Barkley, which was canceled January 14, 1868.

The tract in dispute was excepted from the withdrawal for the benefit of said grant by reason of the entry of Barkley, and after the cancellation of his entry the tract became subject to selection by the road, or to entry under the homestead and preemption laws by the first legal applicant.

On June 6, 1868, Michael Donovan, the petitioner, presented his application to the local land office to make homestead entry of all the land embraced in the former entry of Barkley, and was informed by the local officers that he would be allowed to enter the eighty acres in the even section, but would not be allowed to enter the eighty acres in section 35, as the same was railroad land and not subject to entry. Whereupon, he made entry of the E. ½ of the S. W. ¼ of Sec. 26, upon which final certificate issued May 18, 1875, and which was patented to him July 1, 1875.

Subsequently to the application of Donovan, to make entry of said tract, to-wit, the E. ½ of the N. W. ¼ of Sec 35, the railroad company selected said tract on account of the grant, and it was certified to the State for the benefit of the railroad company March 25, 1871.

Upon the filing of Donovan's petition, the railroad
192 company was called upon to show cause, within thirty days, why said petition should not be granted, and in response thereto the company on December 16, 1888, filed its answer objecting to the granting of said petition upon the following grounds:

"1st. The Act of March 3, 1879, does not in any sense apply to indemnity lands, and an additional homestead entry under said Act is not permissible.

2nd. Donovan when he made H. E. 5797, for 80 acres in Section 26, exhausted his homestead right, and therefore he has no right to the land herein involved which requires the protection referred to in the Rule."

It can not be questioned that at the date of Donovan's application to make entry of said tract it was open public land, subject to entry under the preemption or homestead laws by

the first legal applicant; that Donovan was the first legal applicant after the cancellation of the homestead entry of Barkley, and that his application was improperly rejected. But you denied the petition, upon the ground that Donovan waived his claim to the tract in the odd section by eliminating the same from his homestead application after its rejection, and perfecting entry for the land in Sec. 26, and that when he perfected said entry he exhausted his right under the homestead law, and was not in a position to assert a legal claim to the land in Sec. 35 after it was selected and certified on account of the grant. It is upon this ground, mainly, that the railroad company, also, defends. But, in addition thereto, the
193 company has filed a certified copy of the record of the district court of the Sixth Judicial District of Minnesota, in the case of Michael Donovan v. Thomas S. Thompson, involving the right of possession to the land in question, for the purpose of showing that by judicial process the grantee of the railroad company has been declared to be in legal possession of said land.

The third section of the act of March 3, 1887, provides:

"That if, in the adjustment of said grants, it shall appear that the homestead or preemption entry of any bona fide settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws: Provided, that he has not located another claim or made an entry in lieu of the one so erroneously canceled: And provided also, that he did not voluntarily abandon said orig- entry: And Provided further, That if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed land shall be disposed of under the public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to bona fide settlers residing thereon."

194 It was undoubtedly the intention of the act to protect the bona fide settler in all his rights as against the railroad company, and, therefore, the object and purpose of section three, above quoted, was not only to correct all decisions made by the Department or the General Land Office, erroneously canceling the homestead or preemption entry of any bona fide settler to lands within railroad grants, whether said lands had been certified to the company or not, but, also, to reinstate the settler in all his rights to lands upon which he may have settled, and for which his application to file or enter may have been rejected by the local office, provided it be

shown that said application to file or enter was erroneously rejected, and that the settler had not located another claim or made entry in lieu of the land for which his application to file or enter had been so erroneously rejected.

In such case, the Department is reinvested with jurisdiction to reinstate the settler in all his rights, and to allow him to perfect his entry or filing by complying with the public land laws, if application to be reinstated in such rights be made within a reasonable time.

While it is true that as between the government and the settler, he acquired no vested right upon the mere application to enter, yet he had an inchoate right as against every one else, and if it appears that the land was subject to entry at the date of his application and such application has been erroneously rejected, his right to the land under this section is made
195 superior to that of a bona fide purchaser for value from the railroad company.

In this case, it appears from the record that, although Donovan's application was rejected, he nevertheless, upon the refusal of the register to allow him to enter the same as a homestead, still remained in possession of said land, and made improvements there, by fencing and cultivating the same: That in 1881 he had fenced about fifteen acres of said land, used the same for pasture, and is still in possession of said land.

These facts are not denied by the company in answer to the rule, and said facts are substantially set forth in the decree of the court in the case of Donovan V. Thompson, above referred to, although the court held that Donovan is not an actual settler on the land, and has not constantly, occupied the same, or caused the same to be occupied, since the year 1868, and that he is not entitled to the possession of the same and has no claim, right or interest in the same; that the Southern Minnesota Railway Company is the legal owner of said land, and the defendant (Thompson) is the equitable owner of the same, and is entitled to the possession of the tract.

This decision is not such an adjudication of the rights of the parties as will prevent the Department from taking jurisdiction of the case under the third section of the act of March 3, 1887, and the only question remaining is, whether Donovan has exhausted his homestead right and waived all right to the land within the odd section by perfecting homestead
196 entry and receiving patent for the land in section 26.

It is insisted by the company that Donovan would have no right to make an additional entry except under the

act of March 3, 1879, which applies to even sections only, and within granted limits, and that as the land in controversy is within the indemnity limits, he was not restricted to eighty acres at the time of making his homestead entry, and can not therefore, make an additional entry under the act of March 3, 1879.

In my opinion his rights will not depend upon said act of March 3, 1879, but upon his right under the act of March 3, 1887, to be reinstated to all the rights under his application to enter the same under the homestead law, which was erroneously rejected, and the mere fact that he made entry of part of the land embraced in his application, will not bar him of the right to be reinstated in the same manner as if the entry had been made and was subsequently erroneously cancelled.

It is not the making of an additional or a second homestead, but an application to be restored to his original homestead right.

This question seems to have been settled by the decision of the Department in the case of Holmes v. Northern Pacific Railroad Company (5 L. D., 333).

In that case Holmes made entry for a tract of eighty acres in section 24, together with a tract of eighty acres in section 13, being adjoining land. The entry, so far as it covered the land in the odd section, was canceled by the decision of
197 the Department, being in conflict with a railroad grant, and Holmes perfected entry to the eighty acres in the odd section, and received patent therefor. Subsequently, Holmes applied to amend his entry so as to embrace the land in section 13, being part of the tract covered by his original entry, and which was canceled as before stated, claiming that said tract was excepted from the grant to the railroad company by the homested entry of one Miller that existed at the date of withdrawal, and which was canceled after withdrawal and prior to Holme's entry.

Your office held, that under existing rulings, the entry should have been allowed, but as Holmes's right to the tract in controversy was fully considered and adjudicated under the rulings in force at the date of the cancellation, it could not now be reopened. The Department, however, held that although the case as then presented, between the railroad company and Holmes, was res adjudicata, yet that as it appeared at the date of the application to amend the company was not entitled to the land, having been excepted therefrom by the entry of Miller, under the rulings of the Department then in force, there was no reason why the case should not be considered as one solely between Holmes and the government, and

that he should be allowed to amend his entry so as to embrace all the land originally covered by it. It was, therefore, held that no other rights having intervened, and the question being one solely between Holmes and the government, he was entitled to such favorable action as would secure to him
198 the benefits of his original entry and the improvements made thereon. It was accordingly directed that his original entry should be reinstated, and that patent should issue to him for the entire one hundred and sixty acres, upon surrendering the patent that had been issued for the eighty acres, it appearing that his final proof covered the entire one hundred and sixty acres.

But independently of this, the act of Congress of March 2, 1889, allows an additional homestead entry for such a quantity of land as with the land already entered shall not exceed one hundred and sixty acres, in all cases where a person has heretofore made entry and final proof for a less quantity than one hundred and sixty acres.

Considering that it was the purpose of the act of March 3, 1887, to protect all bona fide settlers in their rights to lands covered by their settlements and improvements, whether the application to enter or file had been rejected, or, having been allowed was afterwards erroneously canceled, or for any part thereof, by the officers of the Land Department, and where the application was rejected or erroneously canceled as to part of any entry made, such settler would be entitled to perfect his entry to the entire tract originally applied for, notwithstanding the issuance of patent for part of the land, I am of opinion that this case should be reinstated, and that Donovan should be allowed to perfect his entry of the remaining portion of the land covered by his original application in
199 accordance with the fifth section of the act of March 2, 1889.

This class of cases seems to be provided for by that part of the circular to registers and receivers, of February 13, 1889, which is as follows:

"While the act contains no provision relative to persons whose entries or filings have not been canceled, but whose lands have been certified or patented on account of railroad grants, it follows, as a matter of course, that their rights should be protected, and the mode of procedure in such cases will be the same as in the cases where cancellation has been made, except that the parties should apply to make final proof and payment, instead of for reinstatement of entry; but in such case proceedings will be deferred until the title has been restored to the United States as provided by section two of

the act. The instructions of Nov. 22, 1887, under this section, are hereby modified in accordance with the foregoing."

The decision of your office is reversed, and you are hereby directed to make demand upon the Chicago, Milwaukee & St. Paul R. R. Company for reconveyance of said land, and if the company refuse to reconvey you will return the papers to the Department to be submitted to the Attorney General for the purpose of instituting proceedings against the company to have said certification canceled as provided for by the 2d section of the act of March 3, 1887.

Further action on the application of Donovan will be suspended until said land has been reconveyed, or until the
200 final determination of the question by the Court—in the event the company shall refuse to reconvey said land.

Herewith are returned the papers in the case.

Very respectfully,
JOHN W. NOBLE, Secretary.

Indorsed: E—1666. (Stamp of Dept. of Interior so indistinct that it cannot be read.)

3537. Department of Interior, April 1, 1889.

Secretary overrules Commissioner's recommendation in case of Michael Donovan and directs that a demand be made upon the C. M. & St. P. Ry. Co., for reconveyance of E½ NW¼ 35-101 N-28-W.

5
Secty to Comr.
Apr. 1-89.
C.

D. 7—6515 S. S. M.
F. Department of the Interior.
E. I. S. General Land Office.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy of a letter from the Commissioner of the General Land Office to the Secretary of the Interior, dated April 12, 1890, is a true and literal exemplification of the record of said letter in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

[Seal U. S. General Land Office] BINGER HERMANN,
Commissioner of the General Land Office.

201 GOVERNMENT EXHIBIT "D."

"F" Department of the Interior, C. H. B.
General Land Office. W. C. E.

Washington, D. C.,
April 12, 1890.

Hon. Secretary of the Interior,
Washington, D. C.

Sir: Pursuant to the direction given in your decision of April 1, 1889, in the matter of Michael Donovan's application for reinstatement of his homestead entry right, and for the institution of proceedings under the act of March 3, 1887, to recover title to the E½ NW¼ Sec. 25, Town 101, N. range 28 W. 5th p. m., Minnesota, this office, by letter dated April 9th, 1889, and addressed to H. G. Haugan Land Commissioner of the Chicago, Milwaukee & St. Paul Railway Company, made formal demand for the reconveyance of title to the land described to the United States. The time prescribed by statute (90) days was mentioned in said letter as the period within which compliance should be made, under pain of institution of proceedings for recovery as provided by law in the event of failure. More than one year has elapsed since the date of mailing said demand, and no response has been made, nor to my knowledge has action of any kind been taken in the matter by the railway company. The papers relating to said matter, marked and numbered as indicated schedule below, are transmitted for your consideration, and such action as may seem proper, viz.:

202 1. Donovan's Application.

2. Copy of Commissioner's letter of July 9, 1888, laying Rule to show cause upon railroad company.

3. Company's response to Rule of July 9, 1888, supported by abstract of court proceedings in case of Donovan vs. Thompson.

4. Commissioner's letter of Feby. 14, 1889, forwarding papers to Secretary of the Interior, with recommendation adverse to granting petitioner's prayer.

5. Secretary's decision dated April 1, 1889, overruling Commissioner's recommendation, and directing that demand be made upon the company for reconveyance of the land.

6. Commissioner's letter of April 9, 1889, demanding reconveyance of the land to the United States.

Any copies or exemplifications of records of papers on file in this office, necessary to the prosecution of proceedings in this matter will be promptly furnished upon request.

Respectfully, LEWIS A. GROFF,
Commissioner.

Indorsed: Letter to Comr. to Secty. Apr. 12-90.

203 GOVERNMENT EXHIBIT "E."

3539-1890. L. R. S. E. F. B.

Department of the Interior,
Washington. April 16, 1890.

To the Attorney General.

Sir: I have the honor to transmit herewith a communication from the Commissioner of the General Land Office, of the 12th instant, and the papers therein referred to, relative to the application of Michael Donovan, for the institution of proceedings under the act of March 3, 1887, (24 Stat., 556) to restore to the United States title to the E½ of Nw W¼ of Sec. 35, T. 101 N., R. 28 W., 5th p. m., Worthington, Minnesota.

From the papers herewith enclosed, it will be seen that this application was passed upon by this Department, and on April 1, 1889, I decided that the tract in question was not subject to selection by the Southern Minnesota Railway Company, and was therefore improperly certified for the benefit of said road, and that Donovan under said act was entitled to be reinstated in his right to make homestead entry of said land, which had been erroneously rejected, I therefore directed that the railway company be called upon to reconvey said land, and upon failure or refusal to reconvey that the papers be re-

204 [—] for the purpose of instituting proceedings against the company to have said certification canceled, as provided by the second section of the act of March 3, 1887.

A rule was served upon the company, in accordance with the directions contained in said decision, and no response has been made thereto within the time limited in said rule.

Said papers are therefore transmitted for your consideration with the request that suit may be instituted to have said certification canceled, if in your opinion said suit can be maintained.

The reasons for holding that said land was improperly certified to said company are fully set forth in the decision of this Department, made April 1, 1889,—a copy of which is herewith transmitted. Any other information or papers in the possession of this Department, relative to said matter, which may be required, will be furnished upon application.

Very respectfully,
JOHN W. NOBLE,
Secretary.

Indorsed. E. Secty. to Atty. Genl. Apr. 16, 90.

Indorsed. Stipulation of Facts. Filed November 2d, 1901. Henry D. Lang, Clerk. By Louise B. Trott, Deputy.

Complainant rests.

205 On the 12th day of December, 1901, the parties met pursuant to adjournment, being represented by their respective solicitors, at the City of Blue Earth, County of Faribault, State of Minnesota, at 11 a. m. of said day, in accordance with the agreement of the respective solicitors setting said place and time for the further taking of testimony in the cause and the special examiner being present the following proceedings are had.

Frederick P. Brown, a witness of lawful age, produced and sworn on the part of the defendants represented by Mr. Dunn, & Mr. Norris testifies as follows:

Examination-in-Chief

By Mr. Dunn:

Q. Where do you reside? A. Blue Earth.

Q. How long have you resided here? A. Since 1866.

Q. What was your business in 1885, 1886, 1887 and 1888?

A. I was in 1867 and 1868—

Q. No, 1886? A. I was Register of Deeds.

Q. You were Register of Deeds of this county?

A. Yes, sir.

Q. Did you know in his lifetime one O. C. Erichsrud?

A. Yes, sir.

Q. Do you know at what time he departed this life, about what time?

A. I couldn't say exactly the date, but I think it must be twelve or thirteen years ago.

Mrs. Erichsrud: Thirteen years ago this Spring. March I think it was.

Mr. Dunn: March, 1887?

206 Mrs. Erichsrud: March, 1888, I think it was.

Q. March, 1888, she thinks it was?

A. I don't know, I think that is about it.

Q. You were appointed as administrator of his estate?

A. Yes, sir.

Q. I think that was in 1888?

A I don't recollect the date exactly.

Q. Did you qualify and act as such administrator?

A. Yes, sir.

Q. Did you have charge of any real estate that Mr. Erichsrud had in this County, as administrator?

A. Yes, sir; we had, that is Mr. Hagan done most of that business.

Q. But you know the fact?

A. I know the fact, yes, sir.

Q. Do you know the eighty acres of land that is involved in this law suit, the East half of the Northwest quarter of Section 35 Township 101, Range 28? A. Yes, sir.

Q. Township of Pilot Grove? A. Yes, sir.

Q. You had charge of that eighty acres belonging to the estate of Mr. Erichsrud? A. Yes, sir.

Q. During your period of administration? A. Yes, sir.

Q. Was the farm rented to anybody during your administration?

A. Well, now I wouldn't say about that. Mr. Hagan can tell you about that, because he took charge of that matter.

Q. You don't know?

A. No, I wouldn't be positive, because he had charge of that matter, and it was so long ago.

Q. Was there a crop received from that land?

A. I think so, that is I am not positive but I think so.

Q. After your closing up of your matters as administrator, did you have anything further to do with this land? A. Yes, sir, I did.

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Q. What did you have to do? A. I sold it.

Q. You sold it? A. Yes, sir.

Q. For whom? A. For the heirs of O. C. Erichsrud.

Q. Who were they?

A. Mrs. Erichsrud, his wife, and the children Ada, Julia and Mabel.

Q. To whom did you make the sale?

A. Louis K. Woodwick.

Q. One of the defendants in this action?

A. I believe he is.

Q. That is to say, you acted as his agent?

A. I wouldn't say I acted as his agent, Mrs. Erichsrud asked me to sell it.

Q. You acted as their agent in selling it to Mr. Woodwick?

A. Yes, sir, I did.

Q. Did the money he paid for the land pass through your hands? A. Yes, sir, every cent of it.

Q. Every cent of it? A. Yes, sir.

Q. How much money did he pay for the land?

A. All these things passed away. I don't think I know now about that, I didn't think anything about it at the time. I can't tell exactly the amount it was; I think it was $2000, or else something like that.

Q. About $2000? A. Yes, sir.

Q. Did you draw the deed? A. Yes, sir.

Q. And deliver it to Mr. Woodwick? A. Yes, sir.

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Q. Look at that deed and see if you recognize it?

Counsel shows a paper to witness.

A. That is the deed. I drew that deed.

Said paper just identified by the witness is marked defendants' Exhibit 1.

Q. Did you deliver this deed to Mr. Woodwich?
A. Yes, sir.

Mr. Dunn: I will introduce this deed in evidence, that has been marked defendants' exhibit 1.

It is agreed between respective counsel that as the deed is an original one, a copy of the same may be substituted for and with the same force as the original.

Q. Did you understand about the title to this land at the time, you having been Register of Deeds?
A. There was no question with me about the title.
Q. You had been Register of Deeds? A. Yes, sir.
Q. And you understood about the title to the land?
A. Yes, sir, the title on the record seemed as good as the title to your farm or to mine.
Q. The title in whom? A. In Erichsrud.
Q. Or in the Erichsrud heirs and Mrs. Erichsrud?
A. Yes, sir, it was in O. C. Erichsrud.
Q. That is the name it started with, but of course after his death the decree of the Probate Court showed on the record to whom it should go? A. Yes, sir.
Q. Did you explain the condition of the title to Mr. Woodwick? A. Yes, sir, and I gave him an abstract of the title.
Q. You gave him an abstract of the title?
209 A. Yes, sir.
Q. And you explained to him how the title came, did you?
A. Yes, sir, there was no question about that, as far as the title was concerned.
Q. I am not speaking about that? I want to know what you said to Mr. Woodwick about it?
A. I wouldn't have let Mr. Woodwick buy it, he was an old friend of mine, if it was wrong, or if I thought it was wrong.
Q. You say you furnished Mr. Woodwick an abstract of that title? A. Yes, sir.
Q. (A paper is here shown witness.) Just look at this abstract and see whether that is the abstract you furnished to him?
A. Well, that I couldn't tell you, Mr. Dunn, whether or not this is the abstract. I don't know that because I was not Abstractor at that time.
Q. But you furnished him an abstract?
A. Yes, sir, I furnished him an abstract.

Q. You took possession of the money before it was passed over to Mrs. Erichsrud? A. No, I didn't, only part of it.
Q. As far as Mr. Woodwick is concerned? A. Yes, sir.
Q. You acted as her agent?
A. Yes, sir, and the children's agent, then they were of age.
Q. Mr. Erichsrud and all these children were of age?
A. Yes, sir.
Q. And you acted as their agent?
A. Yes, sir, I acted as their agent.

210 Cross-Examination

By Mr. Gilman:

Q. You know, Mr. Brown, at the time that you sold the land to Mr. Woodwick that it was claimed by Mr. Donovan, didn't you?
A. No, sir, I didn't know it was claimed by him, but we had spoken several times about it, I will admit that.
Q. You knew that he claimed the land, did you not?
A. No, sir, I didn't know that he claimed it.
Q. Didn't you know that there was a suit, and that this suit was pending, involving the title to the land?
A. No, sir, I didn't know that at that time. I have known of it but I didn't know about it at that time, although I found out afterwards that there had been such a thing.

Mr. Dunn: You don't mean this suit, not this suit, you are speaking about the state suit?
Witness: Yes, the state suit.
Mr. Dunn: But this particular suit we are now trying?
Witness: No, I never knew anything about that.
Mr. Dunn: You never knew anything about that?
Witness: No.

Q. Did you apply to Mr. Woodwick to buy the land, or did he apply to you to buy it first?
A. I don't know; but I think that I asked several here to buy the land, because the Erichsrud people wanted to sell it, they needed the money. They wanted the money, one or two of the girls needed it. I said I would try my best to sell it, to try and find somebody that would buy it, and I spoke
211 to Mr. Woodwick about it.
Q. You spoke to him about it?
A. I spoke to Mr. Woodwick and told him, "There is a good chance for you to buy this land;" he being an old friend of mine.
Q. Didn't you tell him that there was a dispute about the title, but that the records showed a clear title in Mr. Erichsrud? A. No, sir.
Q. And that the title was safe to him? A. No, sir.

Q. Didn't you tell him there was a dispute about the title?
A. I tell you, no, sir.
Q. Was there any other writing executed to Mr. Woodwick by anyone, besides the deed, at the time he purchased or about that time? A. Any other what?
Q. Any other writing, any other written instrument given to Mr. Woodwick with reference to this land, besides the deed?
A. Not that I know of, I never saw any.
Q. Do you know who furnished the money to Mr. Woodwick to purchase the land?
A. I think I do, yes, sir.
Q. You think you do know? A. Yes, sir.
Q. Who furnished him the money?
A. Mr. Woodwick himself. He had the money, because he gave me depository checks that he had had here in the bank for some time; that is the reason.
Q. How long was it after the death of Mr. Erichsrud that you made this sale to Mr. Woodwick?
A. I don't know. It will be some ten years ago
212 when I made it. The deed will show when I made the deed, or Mrs. Erichsrud.
Q. At the time you made this sale you were not acting as the administrator of the estate? A. No, sir.
Q. You had closed up the administration?
A. Oh, yes, long before that.
Q. Did you get any commission, any pay for making this sale? A. No, sir, not a dollar, I wouldn't take it.
Q. You did it as a matter of favor to the Erichsrud people?
A. Yes, sir.
Q. To the widow and children?
A. Yes, sir, I had done lots before that for them. I had done a good many things for them.
Q. You knew Mr. Donovan at that time, didn't you?
A. I had known him for many years.
Q. Did you know at that time that the place where he lived was his homestead?
A. I suppose I could find it, I never was there. I suppose I could have found it, because I was very well acquainted with descriptions of land in this country.
Q. Did Mr. Woodwick go and examine the land before he purchased it?
A. Yes, sir, I guess Mr. Woodwick and my son went out there and examined the land first.
Q. There were no buildings on the land?
A. I don't know about that; I never was there, so I couldn't tell you how that was.
Q. You never were there? A. No, sir, I never was there.

213 Peter Hagan, a witness of lawful age produced and sworn on the part of the defendants, testifies as follows:

Examination-in-Chief

By Mr. Dunn:

Q. Where do you reside? A. Blue Earth City.

Q. How long have you resided here?

A. Twenty-one years.

Q. Did you know Mr. O. C. Erichsrud in his life time?

A. Yes, sir.

Q. Were you a business partner of his at the time of his death? A. No.

Q. Were you for some time prior to his death?

A. Yes, sir, I was.

Q. Did you know of his purchasing, during his life time, the land in dispute, which is the East half of the Northwest quarter of Section 35, Township 101, Range 28, which is the land that is in controversy here?

A. Yes, sir, I know where the land is.

Q. You know where the land is, do you? A. Yes, sir.

Q. Were you appointed one of his administrators at the time of his death? A. I was.

Q. Did you take charge of this piece of land, as one of his administrators, after his death? A. I did.

Q. Whom did you find in possession of it, when you went to take charge of it, in actual possession?

A. Mr. Thompson was on the next quarter.

Q. Who was in actual possession on this eighty?

A. Mr. Erichsrud was.

Q. I mean under him, at the time you went up there was not the land rented? A. Yes, sir.

214 Q. At the time you took possession? A. Yes, sir.

Q. That is what I mean? Who was working the land? A. Mr. Thompson.

Q. Mr. Thomas Thompson? A. Yes, sir.

Q. He worked it, as you understood, for Mr. Erichsrud?

A. Yes, sir.

Q. Was there a crop raised on the farm? A. Yes, sir.

Q. Did you take charge of the crop for Mr. Erichsrud, as administrator of his estate? A. Yes, sir.

Q. And you remained in charge of this land, with Mr. Brown, up to the time of the settlement of the estate?

A. Yes, sir.

Q. You were discharged as administrator?

A. I was, yes, sir.

Q. How much land was under cultivation while you were administrator of this estate?

A. Well, I never measured it, because Mr. Thompson broke it and put it into flax. I couldn't say how many acres there was.

Q. About what proportion should you judge of the eighty was under cultivation?

A. Well, I should judge there was about fifty acres.

Q. About fifty acres? A. Yes, sir, broke.

Q. And under cultivation?

A. Yes, sir, I couldn't say, because I never measured it.

Q. At that time was there a well defined road there on the north side of the line of the land, a road running east and west? A. Yes, sir, there was a road there.

Q. Who lived on the North side of the land?

A. Well, I don't know who lived on the North side; I suppose Mr. Donovan did.

215 Q. On the eighty north of the road? A. And West.

Q. The eighty acres north of that road is directly north of this land?

A. I have never been on Mr. Donovan's land; I don't know whether his goes down to the corner or not.

Q. There was a road on the North side of the land at that time? A. Yes, sir.

Q. How near that road was the breaking on this eighty?

A. Well, I couldn't say, because the well—

Q. Well, what I mean is, was it close up to the road, or was there a piece of prairie strip between them?

A. There was a piece of land that ran close to the road, so it was not broke.

Q. It was not broken?

A. No, there was hay on that.

Q. Do you know who cut the hay on that, the year you took charge of the land? A. Mr. Thompson.

Q. Mr. Thompson was Mr. Erichsrud's tenant, was he?

A. Yes, sir.

Q. Did you make a payment on behalf of Mr. Erichsrud for this land? A. Yes, sir.

Q. Did you receive the deed? A. Yes, sir.

Q. Did the deed come from the railroad company into your possession? A. Yes, sir.

Q. Would you know the deed if you were to see it now?

A. Yes, sir.

Q. (A paper is shown witness.) Just look at that and state if that is the deed?

A. That is the deed, that is the instrument, yes, sir.

Q. You received the deed?

A. Yes, sir, the name is right on there.

216 Said paper last shown witness is now marked defendants' Exhibit 2, and the same is offered in evidence by Mr. Dunn.

It is agreed between respective counsel that this being an original deed, a copy of the same may be made and substituted for and with the same force as the original.

Q. You say there was no one in possession of this land, except Mr. Thompson, for Mr. Erichsrud? A. No, sir.

Cross-Examination

By Mr. Gilman:

Q. This marshy piece of land that you say was next to the road extended the whole end of the eighty?

A. I couldn't say as to that, because I don't know. I don't think it did.

Q. About how far did it run? A. I don't know.

Q. Was it the east or the west side of the eighty that this marsh was on? A. It was on the north.

Q. It was on the north side?

A. Yes, sir, as far as I can remember.

Q. Was it plowed up to the road, where the land was in condition to be plowed?

A. Well, I don't know, of course I never examined that, not to see so close as that.

Q. Was it the first year after Mr. Erichsrud got the deed for the land that Thompson cultivated it?

A. He was there before he got the deed.

Q. After he got the deed did he cultivate it on shares for Mr. Erichsrud, or did he cultivate it all for himself?

217 A. He cultivated it for Mr. Erichsrud.

Q. He cultivated it for Mr. Erichsrud the first year after Erichsrud got the title? A. Yes, sir.

Q. Was he cultivating it on shares, or was he simply hired to cultivate it by Mr. Erichsrud?

A. No, sir, he was cultivating it on shares.

Q. He cultivated it on shares? A. Yes, sir.

Q. What proportion of the crop did Mr. Erichsrud get?

A. I think he got a third of the crop.

Q. A third of the crop? A. Yes, sir.

Q. How long did Mr. Thompson continue to cultivate that land after Mr. Erichsrud got the deed for it?

A. Well, it was in 1887, that is the time I had charge of the land as administrator.

Q. When you had charge of the land as administrator in 1887? A. Yes, sir.

Q. That was after the death of Mr. Erichsrud?

A. Yes, sir.

Q. How long prior to that time had Mr. Thompson been cultivating it under Mr. Erichsrud?

A. Well, not long, because he just had the land; but Thompson had it before.

Q. How long prior to his death did Mr. Erichsrud get the deed for the land?

Mr. Gilman: What is the date of the deed to Mr. Erichsrud?

Mr. Dunn: The 20th of March, 1888.

Q. When did you say Mr. Erichsrud died?

A. Mr. Erichsrud, when did he die?

218 Q. Yes? A. He died in 1888.

Q. Do you know in what month of the year it was?

Mrs. Erichsrud: The 27th of March, the same month.

Mr. Gilman: The same month?

Mrs. Erichsrud: Yes, sir, you see he came home—

Q. Then Mr. Thompson had gone into possession of it after Erichsrud got the deed, and before his death?

A. Thompson had a contract for the land before Erichsrud got it.

Q. I am speaking of the arrangement between Thompson and Erichsrud?

A. The arrangement I don't know anything about.

Q. Was there a writing between them with reference to the land?

A. I couldn't tell you about that, I was not there, because I was in Europe at the time.

Q. When you went there you found, you say you had charge of the land after Mr. Erichsrud's death, and you found Thompson there in possession? A. Yes, sir.

Q. And Thompson, you say, was cultivating it on shares?

A. Yes, sir.

Q. Was there a writing between Thompson and Erichsrud with reference to that land? A. I suppose there was.

Q. Do you recollect distinctly?

A. I never saw any writing, but I think there was, I think that was the case, because—

Q. How do you know that, you say you didn't see any writing? A. Because I had to take charge of the land.

Q. But how do you know the proportion or share that Mr. Erichsrud was to have, if there was not any writing that you knew of?

A. When I got the deed Mr. Erichsrud wrote to me

219 and told me to attend to it, and I done so.

Q. Was that during his life time?

A. Yes, sir, then I supposed he had made arrangements for cultivating the land.

Q. *You supposed he had;* but I want to know how you knew the proportion of the crop that Mr. Erichsrud was to get, if there was not any writing between him and Thompson?

A. There might have been a writing, I couldn't say as to that, because that was something I didn't know anything about.

Q. There might have been a writing of course, but how do you know that Erichsrud was to have a third of the crop?

A. That was what Mr. Thompson told me.

Q. Mr. Thompson told you that? A. Yes, sir.

Q. That is how you know? A. Yes, sir.

Q. You took Mr. Thompson's word for it, but you don't know whether there was any writing or not?

A. Probably there was a writing? A. I don't know.

Q. I don't care about probably. I want to know what you know about it. You don't recollect any writing distinctly?

A. There might have been.

Q. I don't care about your might have been. I am asking you what you know and distinctly recollect about it?

A. The only thing I recollect was this, that Thompson worked the land and Erichsrud should have a third of the crop.

Q. How do you know he was to have a third of the crop?

A. Because he told me.

Q. Who told you? A. Mr. Erichsrud.

220 Q. Mr. Erichsrud was dead?

A. No, he was here after that land was bought.

Q. Then Mr. Erichsrud after he bought the land, told you that he had rented it to Thompson, and he was to have a third of the crop?

A. There was a writing, I suppose, between the two.

Q. I am not asking you what you suppose. I ask you if you know? A. I never saw any writing.

Q. Do you know there was any?

A. I couldn't say that.

Q. You said a moment ago that Thompson told you that Erichsrud was to have a third of the crop; is that all you know of what he was to have, what Thompson told you?

A. That is all I can recollect about it.

Q. Isn't it a fact that Thompson was to have the title to the land back, if he paid Mr. Erichsrud what Erichsrud had paid out, and what Thompson owed Erichsrud, wasn't that it?

A. I don't know anything about that.

Mr. Dunn: I object to this as not cross-examination.

Q. Well?

A. I don't know that, because I was not there, I was not in possession of the land. If there was anything of that kind it must have been between the two.

Q. How long did Thompson continue to occupy the land after you took charge of it as administrator?

A. Well, I couldn't say, I don't know.

Q. How many years?

221 A. I was discharged in November, after we settled up the estate.

Q. November of what year? A. 1888.

Mr Dunn: The same year?

Witness: The same year, yes, sir.

Q. Then you had nothing to do with the land after that?

A. No, I had nothing to do with the land after that.

Q. Do you know how long Mr. Thompson continued to occupy the land after that? A. I don't know.

Q. You say you were a partner of Mr. Erichsrud, how long before his death did that partnership terminate?

A. I came here in 1879, and we were in partnership until 1886, and then I went to Europe.

Q. Then the partnership terminated a year before his death? A. Two years.

Q. Two years before his death? A. Yes, sir.

Q. Did you know Thompson at that time? A. I did not.

Q. What business were you and Mr. Erichsrud in?

A. The mercantile business.

Q. Thompson traded with your firm did he not?

A. Oh, yes.

Q. He was owing Mr. Erichsrud considerable, was he not?

A. No.

Mr. Dunn: I object to this as not proper cross-examination, and I move to strike out the answer of the witness to the last question.

Q. What did you say about that?

A. No, he was not, no more than he paid.

Q. Yes, I know he paid; but he was owing how

222 much, how much did he owe the firm?

A. Well, I couldn't tell you.

Frederick P. Brown, recalled on the part of the defendants for further examination:

By Mr. Dunn:

Q. I believe I will ask you, I think I neglected, as to what disposition you made of the money that Mr. Woodwick paid you?

A. Julia was at the time wanting to use her money, her share of it. I paid Mrs. Erichsrud one-third of the whole amount, and divided the other two-thirds between the children giving to each of them their money, so that they had it.

Q. You gave each of them their share?

A. Yes, I gave each of them their share. I think I had it on a paper; I think I gave that to Mrs. Erichsrud. I think you have got that yet among your papers, Mrs. Erichsrud?

Mrs. Erichsrud: Yes.

Q. When you made this sale to Mr. Woodwick, did you know the condition of the title to the land, to this effect; that the land was land that had been certified to the State of Minnesota for the benefit of the Southern Minnesota Railroad Company, and by the State of Minnesota transferred to the railroad company, and by the railroad company transferred to Mr. Erichsrud? Did you know that fact?

A. Certainly, because I recorded that paper myself,
223 at the time [at the time] when I was Register of Deeds.

Q. Did you inform Mr. Woodwick of that fact, and of that condition of the title?

A. Yes, sir, certainly, and not only that, but that is in the abstract he got.

Q. No matter about the abstract; I want to know whether you informed him of that fact? A. Yes, sir, I did.

Q. So he understood it?

A. Yes, sir; and Mr. Woodwick was pretty good about titles himself.

Anna Erichsrud, a witness of lawful age, sworn on her own behalf as one of the defendants, testifies as follows:

Examination-in-Chief

By Mr. Dunn:

Q. You are one of the defendants in this action, Mrs. Erichsrud? A. Yes, sir.

Q. Where do you reside? A. In Blue Earth City.

Q. You are the widow of O. C. Erichsrud? A. Yes, sir.

Q. At what time did Mr. Erichsrud die?

A. He died the 27th of March, 1888.

Q. The 27th day of March, 1888? A. Yes, sir.

Q. At what place? A. Blue Earth.

Q. Do you know the land that is in controversy in this action, the eighty acres of land in Pilot Grove? A. Yes, sir.

Q. The east half of the northwest quarter of section 35, township 101, range 28? A. Yes, sir.

224 Q. You so understand it? A. Yes, sir.

Q. You know the land, do, you? A. Yes, sir.

Q. Have you ever been to see it?

A. Yes, sir, I have been to see it.

Q. That land came to you and your children as part of the estate of your husband, did it? A. Yes, sir.

Q. Do you know whether your husband had been in possession of that land before his death?

A. Yes, I do. I saw the deed to himself when at the Hot Springs, and sent it right home to Mr. Hagan.

Q. Did you know before the reception of the deed that Mr. Erichsrud had been in possession of it under a contract from the railroad company?

A. I didn't know so very much about it, because I never inquired very much about it.

Q. So you can't say so very much about that?

A. No. I know that he bought it, I saw the deed.

Q. You know he bought it from the railroad company?

A. Yes, sir.

Q. Would you know the deed if you should see it, do you think you would know the deed if you should see it?

A. I don't know whether I would know it or not, it is so long since.

Q. I show you this paper, look and see if you can recognize that deed? A. Yes, sir, I know the deed.

Q. As the instrument you know Mr. Erichsrud received from the railroad company for this land? A. Yes, sir.

Q. You recognize the deed? A. Yes, sir.

225 Q. You didn't know then about his having possession of the land before that deed was executed?

A. I always thought it was this land, I didn't know any other party was in it.

Q. There were three children, were there? A. Yes, sir.

Q. Mabel, Julia and Ada? A. Yes, sir.

Q. The children of yourself and Mr. Erichsrud, that were left? A. Yes, sir.

Q. I will ask you if after Mr. Erichsrud death, and after the administrators were discharged from their office as administrators, if you and the children were in possession of the land up to the time you sold it? A. Yes, sir.

Q. You were? A. Yes, sir.

Q. The children were not of age at the time Mr. Erichsrud died? A. No.

Q. How old were they?

A. The youngest one was only 8½; that is Mabel.

Q. Mabel was eight? A. Yes, sir, she was the youngest.

Q. Ada was the oldest? A. Yes, sir.

Q. How old was Ada?

A. At the time Mr. Erichsrud died she was thirteen?

Q. The children had guardians appointed, or a guardian appointed to attend to their business? A. Yes, sir.

Q. Who was the first one, the first guardian?

A. Mr. Neal was the first one.

Q. Who was appointed after that?

226 A. Mr. Ross was appointed after that.

Q. Mr. E. C. Ross? A. Yes, sir.

Q. He was appointed afterwards? A. Yes, sir.

Q. Did you yourself, and your children through their guardian, have uninterrupted and undisturbed possession of that land, from that time, from the time of the discharge of the administrators, up until the time you sold it? Did you have possession? A. Yes, sir, we had possession of it.

Q. Uninterrupted possession? A. Yes, sir.

Q. Undisturbed possession? A. Yes, sir.

Q. Nobody disturbed your possession? A. No, sir.

Q. And nobody interrupted your possession? A. No, sir.

Q. What did you do with the land when it was still in your possession? A. I rented it.

Q. You rented it? A. Yes, sir.

Q. You never lived on it? A. No, sir.

Q. You rented it to various people who cropped it?

A. Yes, sir.

Q. And you had a share of the crops? A. Yes, sir.

Q. You know Mr. Michael Donovan? A. Yes, sir, I do.

Q. Did Mr. Donovan try to buy the land of you at one time?

A. Yes, he did.

Q. How long ago is that?

A. Why, I should think it was about three years ago.

Q. About three years ago? A. Yes, sir.

Q. What did he offer you for the land?

A. He offered me $19.00 an acre.

227 Q. He offered to pay you $19.00 an acre for the land, did he? A. Yes, sir.

Q. You did not sell to him, because the price was not sufficient?

A. I didn't want to take the offer at his price of payment

Q. The price was not sufficient? A. No.

Q. What he was offering you was not sufficient? A. No.

Q. I will ask you, Mrs. Erichsrud, if this sale to Mr. Woodwick was a sale, as far as you and the children were concerned, a sale in your own interest or in someone else's interest.

A. It was in our own interest.

Q. In your own interest? A. Yes, sir.

Q. Did you receive the money for the land? A. Yes, sir.

Q. Do you know whether the children received their money for the land? A. Yes, sir, I do.

Q. You heard Mr. Brown's testimony to-day, did you not?

A. Yes, sir, I did.
Q. And his testimony is as you remember it?
A. That is correct.
Q. His testimony is correct? A. Yes, sir.
Q. As to the division of the money? A. Yes, sir.
Q. You received one-third? A. Yes, sir.
Q. And the children received two-thirds? A. Yes, sir.
Q. That is of your own knowledge? A. Yes, sir.
Q. You know that to be the fact? A. Yes, sir.
Q. You authorized Mr. Brown to sell the land for you?
A. Yes, sir, I did.
Q. And he was your agent in selling that land?
A. Yes, sir, he was.
228 Q. He was agent for the children and for yourself?
A. Yes, sir.
Q. At the time he made the sale? A. Yes, sir.
Q. Did you know Mr. Woodwich at that time?
A. I knew him well enough to speak to him, yes, sir. He had not lived in town very long at that time.
Q. Mr. Woodwick had been a farmer? A. Yes, sir.
Q. In the neighborhood? A. Yes, sir.
Q. You did not make any arrangement with him yourself?
A. No, I did not.
Q. Nor the children did not, as far as you know? A. No.
Q. It was all done through Mr. Brown's agency?
A. Yes, sir. I wouldn't take it upon myself to sell anything of that kind, because I was not capable of doing it.
Q. Did you know anything about where the title to this land came from, Mrs. Erichsrud? I don't know whether you did or not? A. No, I did not.
Q. You knew nothing about it yourself? A. No sir.
Q. You took it in good faith? A. What is that?
Q. You took it in good faith?
A. Yes, sir, we took it in good faith from the railroad company.
Q. At the time you sold the land, Mrs. Erichsrud, to Mr. Woodwick, did you know anything about anyone else claiming to own that land? A. No, I did not.
Q. Mr. Donovan never claimed to own it, did he?
A. No, sir, I don't remember that he ever did.
Q. He wanted to buy it of you?
A. He wanted to buy it, yes.
229 Q. Can you give me the names of some of the people you rented the land to at the time you owned the land?
A. Mr. Samuel Moore rented it for a couple of years, and Grant Usher rented it for a number of years, and Mr. Carlisle.

Q. Did you pay the taxes on this land after you received it from your husband's estate? A. Yes, sir.

Q. Up to the time you sold it? A. Yes, sir.

Q. Do you know whether they improved the land any, whether they broke any on it during the time you owned the land?

A. Yes, sir, these last two tenants that I had told me that they had broken up some for their own benefit, to improve it, and improved it quite a little.

Q. So that do you know how much land there was really under cultivation at the time you sold it?

A. No. I think there was, I understood there was something between sixty and seventy acres.

Q. Under cultivation? A. Yes, sir.

Q. Then it was nearly under cultivation? A. Yes, sir.

Q. All that could be broken? A. Yes, sir.

Cross-Examination

By Mr. Gilman:

Q. You never lived upon the land, did you, Mrs. Erichsrud?

A. No, we never did.

Q. You were never in the actual possession of it then, never actually occupied it? A. No, we never lived on it.

Q. None of your family ever lived on it? A. No.

230 Q. There was no buildings ever on it, were there?

A. No, I don't think so.

Q. Your possession then simply consisted in your renting it to some persons who worked it on shares, did it?

A. I don't know just how to answer that question. It would be our land just the same.

Q. I am not asking you for your legal opinion about it; I am simply asking you as to what the facts were. Your possession simply consisted in your renting it to somebody else to work it on shares? A. Yes.

Q. Now you say that Mr. Donovan applied to you with reference to a purchase of the land? A. Yes.

Q. Didn't you apply to him to sell it to him. Didn't you want to sell it to him before you sold it to Mr. Woodwick?

A. No, I didn't. I didn't know Mr. Donovan until he wrote to me.

Q. He wrote to you?

A. Yes, sir. He wrote to me and came to the house one time.

Q. You say he wrote to you?

A. Yes, he wrote to me.

Q. Have you got the letter he wrote to you?

A. No, I haven't got the letter from Mr. Donovan?

Q. What did you do with it?

A. Well, I didn't think anything about it, so I didn't keep it.

Q. You haven't got the letter then? A. No.

Q. Did you ever have a personal interview with Mr. Donovan about it, did you ever have any talk with him about it?

A. Yes, sir, he came to the house and talked with me about the land.

231 Q. When was that?

A. That was about three years ago I should think.

Q. About three years ago? A. Yes, sir.

Q. That is the time he wanted to buy the land?

A. Yes, sir, that is the time.

Q. Was that the time he made an offer to you for the land?

A. Yes, sir.

Q. What did he say, if anything, about the land being his?

A. Why, I don't know as to what he said about the land being his, because—

Q. Did he say that he claimed the land?

A. No, I don't know as he did, I don't know as he said he claimed it.

Q. What did he say about the land being his, and that he was entitled to it, if anything?

A. I don't remember what the conversation was at all, I am sure.

Q. Did he claim that the land really belonged to him?

A. No, I don't know as he did. I don't remember whether he told me that or not.

Q. Can't you remember whether he said that the land really belonged to him? A. I couldn't say as to that.

Q. Did he tell you that there was a suit still pending that involved the title to the land?

A. I know there was a suit at one time. I thought that was all over with.

Q. This particular suit that is now pending, did he tell you that the land was in litigation at the time you talked to

232 him about it? A. I don't remember he told me that.

Q. You don't remember he told you that?

A. No, sir, I don't remember. I remember about the suit. I thought it was all over.

Q. You refer to the suit between him and Thompson?

A. Yes, sir, I thought it was all over.

Q. Didn't he tell you that there was a suit involving the title of the land, in which the United States was a party?

A. No, I don't remember that.

Q. You don't remember that? A. No, sir.

Q. Did he say anything about the title being in litigation at the time you had the talk with him?

A. Well, I don't know as I can remember anything of that kind, because I never thought anything about it; because I always thought the land was ours and that it was all right.

Q. But I am asking you as to what Mr. Donovan claimed at that time, at the time he talked with you about it, what he claimed about it.

Mr. Dunn: If he claimed anything.

A. I have no recollection that he claimed anything.

Q. Do you say he did not, or that you don't recollect that he did?

A. I don't remember that he said to me anything about claiming it, or that he claimed it.

Q. Why did he say he wanted to buy it?

A. He wanted to buy the place because he thought he would get it at a bargain price.

233 Mr. Dunn: And it joined his farm?

A. Yes, sir, joined his farm.

Q. You say he offered you $19.00 an acre for it?

A. Yes, sir.

Q. And you finally sold it to Mr. Woodwick for $20.00 an acre? A. $22.50 an acre.

Mr. Gilman: $2000 I think the deed is.

Mr. Dunn: That is $25.00 an acre. $2000 is $25 an acre for eighty acres of land.

Q. The fact is whatever consideration is expressed in the deed is the correct consideration.

A. It may be $2000, but I got it in my mind it was $22.50 an acre.

Q. Did you tell Mr. Donovan at the time what he could have the land for?

A. I don't just remember whether I offered it him and made him a price for it or not. I know I didn't want to sell it at the price he offered me.

Q. Did you know at the time of the death of your husband that the land was still in litigation, or that the title to the land was still in litigation? I don't refer to the Thompson suit, but after that, that the title to the land was still in litigation, did you know that? A. No, I did not.

Q. When did you first hear of that, of the action now pending in this suit? A. Why, when I got that notice.

Mr. Dunn: When you were served with the summons.

Witness: Yes, sir, I was surprised when I heard that
234 this was in court again.

Q. Did you execute any other writing to Mr. Woodwick, besides the deed, with reference to this land, at the time you sold to Mr. Woodwick?

A. No. I don't know that Mr. Brown did. He arranged all that.

Mr. Dunn: Did you execute any other writing to him?
Witness: No.

Q. Did you sign any other paper? A. No, I did not.
Q. Did you give him any other paper? A. No.
Q. Besides the deed? A. No, I don't think so.
Q. You don't know of any person that did execute any other writing to Mr. Woodwick, besides the deed, with reference to this land? A. No, I do not.

Mr. Dunn: There was a lot, was there not, that he wanted you to take? A. Yes.
Witness: Yes.
Mr. Dunn: That was one thing you objected to?
Witness: Yes, sir.

Q. What lot was that?
A. That was a lot in this town, in the east part of town.
Q. What town? A. Just the village here.
Q. The village of Blue Earth? A. Yes, sir.
Q. What did he want you to take that at?
A. $300. I didn't want to take any more property; I felt I had too much on my hands to pay taxes on as it is, and I didn't want to take any more.

235 Mabel Anderson, a witness of lawful age, called on the part of the defendants, being duly sworn, testifies as follows:

Examination-in-Chief

By Mr. Dunn:
Q. Your name prior to your marriage was—
A. Mabel Erichsrud.
Q. You are a daughter of Mrs. Anna Erichsrud and O. C. Erichsrud? A. Yes, sir.
Q. And one of the children spoken of here? A. Yes, sir.
Q. And one of the defendants in this suit? A. Yes, sir.
Q. Do you know anything about this land in question?
A. I don't know anything about the land, of course at the time the land was sold I didn't know anything about it. I only know the only thing I can testify to is I remember the time that Mr. Donovan came to our house to buy the land. That is all I know about it.
Q. We will get to that later on. You know nothing about the land?
A. No, but I was there. I don't know anything about the land.

Q. Did you receive your portion of the purchase money from Mr. Brown, as he testified to? A. Yes, sir.

Q. You signed the deed to Mr. Woodwick?

A. Yes, sir, we all signed it.

Q. Was that sale made in your own interest, or was it for the interest of someone else.

A. It was made for our own interest; we needed the
236 money more than the farm.

Q. Was the sale made in good faith to Mr. Woodwick? A. Yes, sir.

Q. And not for the purpose of concealing the title?

A. No, sir.

Q. Or anything of that kind?

A. We didn't know that the title was in dispute at that time. We simply sold it as a money matter.

Q. You never knew the title was disputed? A. No, sir.

Q. Who had been your guardians until the time you came of age?

A. Mr. Neal, as I remember, originally, and then Mr. Ross was my guardian.

Q. Mr. Neal was your guardian before he died?

A. Yes, sir. And Mr. Ross afterwards. I was of age when Mr. Ross came to be guardian.

Q. You were? A. Yes, sir.

Q. But the other girls were not?

A. No, sir, the other girls were, but I was not.

Q. Do you know anything about Mr. Donovan trying to buy the land? A. I was at home when he came.

Q. Do you remember the conversation between him and your mother?

A. The only part of it that I remember— They stood by the back door most of the time, and as I passed through I heard a little conversation about it. I couldn't tell what it was. I didn't know what he was trying to do. I didn't know who was trying to sell the land. I didn't know whether she was buying it of him or whether he was buying it of her; but I knew they were having a land conversation, I knew they were talking about land.

Q. But you didn't know what they said?

A. No, sir.

237 Q. You know he was there? A. Yes, sir.

Q. You know Donovan was there?

A. Yes, sir, I know Mr. Donovan was there.

Q. And that they had some talk about land? A. Yes, sir.

Q. You don't know what it was, that is you don't know what they said?

A. No, sir, I don't know what they said. I know they had some talk about land.

Wayne Silliman, a witness of lawful age, produced and sworn on the part of the defendants, testifies as follows:

Examination-in-Chief

By Mr. Dunn:

Q. Where do you live, Mr. Silliman? A. Blue Earth.

Q. How long have you lived in this County, In Faribault County, Minnesota? A. Since the Spring of 1858.

Q. Since the Spring of 1858? A. Yes, sir.

Q. You are one of the oldest settlers we have got here then? A. I suppose I am.

Q. Did you ever reside in the town of Pilot Grove?

A. I did.

Q. You know Michael Donovan? A. I do.

Q. That is the town he lives in, Pilot Grove?

A. Yes, sir.

Q. What were you doing in that town? What business were you engaged in then? A. Farming.

Q. Was there or was there or not a large quantity of government and railroad lands in that town when you moved in there?

238 A. There was considerable railroad land and some government land.

Q. About half the land was railroad land, was it not?

A. A large portion of it was.

Q. I mean as early as 1858? A. In 1858, yes.

Q. It was most all government in 1858, was it not?

A. Yes, sir, all government land in 1858.

Q. And in 1866 and 1867, after the land grant to the railroad company, there was a good deal of railroad land there, was there not? A. Yes, sir, there was.

Q. Did you know a piece of railroad land that adjoined Mr. Donovan's farm, south of his farm, did you know it?

A. I know there was a piece of railroad land in there; but I am not very conversant with it.

Q. You were engaged in farming at that time?

A. Yes, sir, I was.

Q. Was your farm adjoining some other land that was belonging to the railroad company? A. Yes.

Q. That was a part of the old S. M. Railroad Company's grant; do you know what that was? A. Yes, sir.

Q. You know what I mean when I say the old S. M., the old Southern Minnesota Railroad grant of land? A. I do.

Q. You have been engaged in a public office as Register of Deeds, and in the auditor's office, so you understand all about that grant, don't you? A. Yes, sir, I do.

Q. I want to ask you as to what you are able to state as to whether the early settlers in that town were in the habit
239 of breaking and farming and using vacant railroad company's land that happened to lie adjoining their farms?

A. Well, I know there was some railroad land right there close by me that was broken and cultivated for a number of years.

Q. Broken and cultivated?

A. Yes, sir, and there was also some there that they cut hay on and used it for pasture and herded cattle on it.

Q. That was done by the settlers? A. By the settlers.

Q. Was that a frequent or an infrequent occurrence?

A. I could not say that it was a frequent thing there, for the settlers for to herd their cattle on the railroad land or cut hay on it.

Q. You should say it was a frequent thing? A. Yes.

Q. You say you do understand that it was a frequent occurrence?

A. It was in the vicinity of where we were, on railroad land, and there was a piece, there was a crop in and it was broke and cultivated for a number of years while it was railroad land.

Q. They would break and cultivate it while it was railroad land? A. Yes, sir.

Q. And when the land should be sold by the railroad company to some private individual, what would the settler do then? A. He would simply quit it.

Q. Simply quit? A. Yes, sir, he would quit.

Q. And surrender it up to the purchaser? A. Yes, sir.

Counsel for plaintiff objects to this testimony as immaterial, incompetent and irrelevant.

240 Q. Do you know several instances of that kind?

A. Well, I knew several pieces of land that was—

Q. Used in that way? A. Used in that way, yes, sir.

Cross-Examination

By Mr. Gilman:

Q. How far did you reside from Mr. Donovan?

A. I think it must have been four or five miles.

Q. Four or five miles from him? A. Yes, sir.

Mr. Dunn: I wish to introduce in evidence in this cause part of the record in the case of the United States v. The Winona & St. Peter Railroad Company and others, found in the 165 U. S. Supreme Court Reports, on page 463; the part that I introduced in evidence is found commencing with the words "that on, before and for a long time" on the ninth line of page 465, and ending with the word administered" on the

tenth line of page 466, except the paragraph thereof marked "f."

I wish to introduce this as an admission on the part of the government of the United States the plaintiff in this case as relating to the issue which we are now trying.

Mr. Gilman: I object to it as immaterial, incompetent and irrelevant, and also because the admission in that case in the 165 U. S. was limited to the issues in that particular case.

The portion referred to by counsel for defendants in the case of the Winona & St. Peter Railroad 165 U. S., 465, 466 is as follows:

241 "That on, before and for a long time after the certification of the lands in question to the State on account of the railroad grants it was uniformly held and ruled by the Secretary of the Interior and the other officers of the land department of the United States; (a) That the line of a railroad became and was definitely fixed so as to attach the grant to the odd-numbered sections within the granted limits as soon as surveyed, staked out and marked on the face of the earth; and (b) That a homestead entry in all respects regular and legal excepted the land covered thereby from the operation of a railroad grant attaching during the existence of such entry; that the validity of a homestead entry was open to question by the company, and if it was shown that such entry was fraudulent or irregular in its inception, or that it had been abandoned before the right of the road attached, it was held not to except the land from the grant, but the burden of so showing was upon the company, and, in the absence of such proof, the entry being valid upon its face, was held to except the land from the grant, even though subsequently abandoned; and (c). That a preemption claim, which may have existed to a tract of land at the time of the attachment of a railroad grant, if subsequently abandoned, and not consummated, even though in all respects legal and bona fide, was held not to operate to defeat the grant, but, upon the
242 failure of such claim, the land covered thereby was held to inure to the grant as of the date when such grant became effective; and (d) That the rights under the grant attached to the lands in the granted and indemnity limits as of the same date, and that selection was not deemed necessary to attach the grant to any specific tract within the indemnity limits; and (e) That the lands within the indemnity limits were withdrawn at the same time as those within the primary or granted limits; ..... and (g) That in pursuance of and in accordance with the aforesaid rules, the grants to and for each and all of the land-grant railroad com-

panies in the State of Minnesota were, before, at and for a long time after the certification of the lands in question, administered."

243 Louis K. Woodwick, a witness of lawful age, produced and sworn on the part of the defendants, testifies as follows:

Examination-in-Chief

By Mr. Dunn:

Q. Are you one of the defendants in this case?

A. Yes, sir.

Q. Where do you reside? A. Blue Earth City.

Q. How long have you resided in Blue Earth City?

A. It will be three years next March.

Q. Before coming to Blue Earth City where did you reside?

A. I resided fourteen miles out in the country for thirty-five years.

Q. Do you mean to say in this County, Faribault County, State of Minnesota? A. Yes, sir, Faribault County.

Q. Did you sell your farm there? A. Yes, sir.

Q. How much did you receive for it?

A. How much did I get for it?

Q. Yes. A. I got $37.50 an acre.

Q. How many dollars altogether?

A. Six thousand dollars.

Q. You brought that money to Blue Earth City with you?

A. Yes, sir.

Q. And since that time you have lived here, have you?

A. Yes, sir, I have.

Q. Did you purchase a piece of land from Mrs. Erichsrud and her children, through the agency of Mr. F. P. Brown at any time? A. Yes, sir.

244 Q. I show you defendants' exhibit 1, and I will ask you if that is the land described in that deed that you purchased? A. Yes, sir.

Q. That is the deed? A. That is the deed, yes, sir.

Q. Defendants' exhibit 1 is the deed that you received on your purchase, is it? A. Yes, sir.

Q. Did you pay the full consideration specified in that deed? A. I did.

Q. $2000? A. Every dollar of it.

Q. Was it your own money or somebody else's money?

A. No, sir, it was my own money. I paid $25.00 more than that, but that is not mentioned in the deed.

Q. You didn't pay $25.00 more. No, you told me what you paid that $25.00 for, it was for something else.

A. Yes, sir, it was for something else.

Q. It had nothing to do with the land?
A. No, sir, I paid $2000 for the land.
Q. Did you see this land before you bought it?
A. Yes, sir.
Q. You went out and examined it, did you?
A. Yes, sir, I did.
Q. Before you bought it? A. Yes, sir.
Q. How much land was there under cultivation when you bought it?
A. Well, it was all except ten or twelve acres, somewhere about that; probably fifteen acres, I wouldn't say as to that. It was all broke up that could be broke up.
Q. All that could be broken was broken? A. Yes, sir.
Q. When you bought the land of Mr. Brown he fur-
245 nished you an abstract of title, as he testified, did he not? A. Yes, sir.
Q. I will ask you to look at this paper which I show you and see whether this is the abstract of title that was furnished to you at the time you bought the land of Mr. Brown, and upon which you relied, if you did rely upon the statements therein contained, when you bought the land.
A. That is the one.
Said paper writing is marked Defendants' Exhibit 3, and is offered in evidence for counsel for defendants.
Mr. Gilman: I object to it as immaterial, incompetent and irrelevant.
Mr. Dunn: I ask you if you object to it because it is not an original record.
Mr. Gilman: No, I do not object to it because it is not an original record. It is a certified copy of the record I suppose.
Mr. Dunn: It is certified to by the abstractor of the County.
Mr. Gilman: No doubt about that.
Mr. Dunn: You don't object to it because it is an abstract?
Mr. Gilman: No, I don't object to it upon the ground of its being an abstract, but simply because it does not contain anything that is relevant or material or competent in this case; even if you had the original papers present here that are referred to in the abstract.
246 Mr. Dunn: The objection simply goes to the materiality of the paper and of the records themselves?
Mr. Gilman: Yes.
Mr. Dunn: In other words, you waive the production of the original instruments?
Mr. Gilman: I don't insist that the original instruments should be produced. My objection is not based upon the ground that they are not produced.

Mr. Dunn: Or even certified copies of them?
Mr. Gilman: Or even certified copies of them.

Q. Did you rely when you purchased that land upon the fact that this land was land which was originally certified and granted to the State of Minnesota for railroad purposes, and by the State of Minnesota deeded to the railroad company, and by the railroad company deeded to Mr. Erichsrud?
A. I did.

Counsel for plaintiff objects to the land question as leading.

Q. You did? A. Yes, sir.
Q. You relied upon that? A. Yes, sir.

Counsel for plaintiff objects to the question as leading.

Q. What did you rely upon? You may state what you did rely upon? A. I relied upon the government and the State.
Q. That the State did what?
A. Transferred it to the railroad company.
Q. And who transferred it to the State?
A. The government.
Q. The United States government?
A. Yes, sir, and the State of Minnesota.
247 Q. The United States government and the State of Minnesota? A. Yes, sir.
Q. Whom did the railroad company transfer it to?
A. O. C. Erichsrud.
Q. You relied upon that fact?
A. Yes, sir, I did. If I hadn't I wouldn't have bought it.
Q. You paid $2000 for it, did you not?
A. I did, cash down.
Q. Did you have any notice of any kind that Mr. Donovan claimed to own that land, or had any claim on that land?
A. No, sir, never, I didn't know about it. If I did I wouldn't have bought it.
Q. You had no notice of that character or description, that anybody was claiming the land? A. No, sir.
Q. Did you enter upon possession of the land after you bought it, in any way?
A. Mrs. Erichsrud assigned a contract to me that she had already for it. She let it in the Spring of the year that I bought it, and when I bought it she assigned the contract to me, and I received the share that Fall, in her place.
Q. You say there was somebody had rented the land of Mrs. Erichsrud? A. Yes, sir.
Q. What was his name? A. Carlisle.
Q. Sam Carlisle, was it not? A. Yes, sir.

Q. You received an assignment of that paper from
248 Mrs. Erichsrud? A. Yes, sir.

Q. At the time you bought the land? A. Yes, sir.

Q. I show you a paper writing, did you ever see that before? A. Yes, sir, that is the contract.

Q. Is that the paper you received at that time?

A. Yes, sir, that is what she assigned to me.

Said paper writing is now marked defendants' exhibit 4, and is offered in evidence by counsel for defendants, together with the assignment on the back of the same.

Q. You received that from Mrs. Erichsrud? A. Yes, sir.

Q. When you bought the land?

A. Brown got it for me.

Q. You received it from him? A. Yes, sir.

Q. From Mr. Brown? A. Yes, sir.

Q. Did you take possession of the land then? A. I did.

Q. With Mr. Carlisle? A. Yes, sir.

Q. He recognized you as his landlord?

A. He did; there was no dispute.

Q. Nobody disputed your possession?

A. Not at all, and I received the share of the crop.

Q. Did you see Mr. Donovan when you went up there?

A. No, I didn't know about him. I was up there when they threshed the grain.

Q. Did he go over there and make any claim of the land?

A. No, sir, he did not.

Q. Did he make any claim to a share of the crop,
249 or anything of that kind? A. No, sir, he did not.

Q. Then you bought the land, acting in good faith, for yourself? A. Yes, sir.

Q. There was no secret understanding between you and Mrs. Erichsrud, that you should hold the land for them or cover it up in any way for them?

A. No, sir, not the least.

Q. Nothing of that kind? A. No, sir, not a thing of it.

Q. What is that land worth? A. Now?

Q. Yes, what is the land worth now?

A. Probably it is worth about $40.00 an acre. It is within two miles of the Village of Elmore, about three miles west.

Q. You have been on the land a good many times.

A. Yes, sir, I have been on there several times.

Q. You have been on the land several times?

A. Yes, sir.

Q. And you are still in possession of it? A. Yes, sir.

Q. How much was broken up?

A. It is all now broken up, except between ten and twelve or fifteen acres, that couldn't be broken. That is bottom land.

Q. Was there any fencing on the land? A. No, sir.
Q. When you bought it? A. No, sir.
Q. Is there a road between that eighty that you bought and the eighty north of it, upon which Mr. Donovan lives?
A. There is.
Q. Is it a well defined road?
A. It is like one of these common roads.
Q. Is it fairly well traveled? A. Yes, sir.
Q. So you could travel it very well? A. Oh, yes.
Q. How is the condition of the breaking on the south
250 side of that road on this eighty? How near up to the road does the breaking come?
A. He broke pretty close to the line on both sides.
Q. On both sides?
A. Yes, sir, where it could be broke. There is a kind of a slough that runs in there; of course, they couldn't break that. Of course I didn't know exactly where the line ran, but it appears to me they broke it on both sides, as close as they could, without interfering with the road?
Q. You never saw this land until about the time you bought it? A. No, sir.
Q. You are an old settler of this county?
A. Yes, sir, I have lived in this county thirty-five years?
Q. Thirty-five years? A. Yes, sir.
Q. You have been a farmer?
A. Yes, sir, until two years ago.
Q. Do you remember about the time that the railroad lands were granted to the State of Minnesota for what we call the Southern Minnesota Land Grant? A. Yes, sir.
Q. You were living here before that, were you not?
A. Yes, sir.
Q. There was some railroad land I believe in your neighborhood? A. Every odd section was railroad land.
Q. Every odd section?
A. Yes, sir, Not when I came into the country, but afterwards, that was what they called them, they called them railroad lands, I supposed they were. Of course I didn't examine the record.
Q. It was Southern Minnesota Railroad land? A. Yes, sir.
Q. Do you know whether it was then the custom among the settlers of this County to use this land and make hay on
251 it, and make such use of it as they wanted to.

Objected to by counsel for plaintiff as immaterial and incompetent.

A. Yes, sir.
Q. Do you know whether there was such a custom?

A. They did, they did, every one of them did it in my neighborhood. They cut hay, made hay on it. The first man was the best man always.

Q. Did they frequently do that?

A. Yes, sir, they would make a furrow there and they cut hay there, and they would go on and break it. They would use it as long as they could. There was no objection to it either.

Q. Then that is the custom in that town?

A. It was in my neighborhood.

Q. It was the custom down there? A. Yes, sir.

Q. How far did you live from Mr. Donovan's land?

A. It must have been fifteen or sixteen or seventeen miles.

Q. You lived there then in what part?

A. Northeast of Elmore.

Q. You lived in the same County? A. Yes, sir.

Q. The same County, Faribault County? A. Yes, sir.

Q. And you say it was not an uncommon thing to see railroad land broken up by some one else who didn't own the land.

Objected to as immaterial, incompetent and irrelevant, and also as leading.

Q. Was it an uncommon thing?

A. No, sir, it was not.

252 Q. It was not uncommon? A. No, sir.

Cross-Examination

By Mr. Gilman:

Q. What was this land worth when you bought it?

A. Well, I couldn't say. I know what I paid for it.

Q. What in your judgment was it worth?

A. I thought it was pretty cheap; that is the reason I bought it.

Q. What in your judgment was it worth?

A. Well, perhaps it was worth, probably $30.00 an acre.

Q. Did you buy it for cultivating it and occupancy? Did you buy it for cultivating it, or did you buy it for speculation?

A. I bought it because I thought it was worth the money. I thought I might as well have the money in that land as to have it lying idle.

Q. You were not farming at the time?

A. No, sir, I was not. I had sold my farm.

Q. You were living here in Blue Earth City?

A. Yes, sir, in Blue Earth City.

Q. You expected to sell the land when you got an offer of what you thought it was worth? A. I would.

Q. You say that you had no information that the title to the land was still in dispute?

A. No, sir, I had not, Mr. Gilman.

Q. Did you know that it had ever been in dispute?

A. No, sir, I didn't know it until afterwards.

253 Q. When did you first hear of the pendency of this present action?

A. It was when Mr. Sheehan served notice on me, the deputy United States Marshal.

Q. When you were made a party of this action?

A. Yes, sir, that was the first time I knew about it.

Q. You didn't know that this land was in dispute, or in litigation until that time? A. No, sir, I did not.

Q. Had you had any talk with Mr. Donovan before that service was made on you, with reference to this land?

A. No, sir, not at all, not about the land. I just knew the old man before; but not a word was spoken about the land anyway.

Q. Didn't you have a talk with him, and didn't he tell you that he claimed the land?

A. He talked some about it, he thought, he said that he thought it ought to be his land.

Mr. Dunn: Was that before you bought it or afterwards?

Witness: No, sir, it was after I bought it.

Q. Before? A. No, sir; it was after.

Q. Didn't you have a talk with him before you bought it?

A. No, sir, I didn't. When I talked with [his] it was afterwards.

Q. You had talked with him before you were made a party to this suit?

A. No, sir, it was quite a while after I bought it.

Q. Was it not before you were served with notice and brought in as a party to this suit? A. No, sir.

Q. You were not brought in as a party to this action until last spring?

A. No, I didn't know anything about it until that time?

254 Q. You knew that Donovan claimed it, before that time?

A. Well, we had possibly talked back and forth, but I had no absolute claim to depend on.

Q. Didn't Donovan come there after you bought the land, and before you were brought as a party to the action in this suit, and didn't Mr. Donovan come there and have a talk with you and tell you that he claimed the land?

Counsel for defendants objects to the question as immaterial, and that anything that this witness did after he bought the land is immaterial.

Q. Do you not recollect that? Don't you recollect that he talked sometimes about that land?

A. I don't remember it, I don't remember that he did. I shouldn't feel—

Q. He claimed the land, didn't he? Didn't he claim that it belonged to him?

A. I can claim a good many things myself.

Q. I am asking you what he did. A. He didn't claim it.

Q. Didn't he claim that the land belonged to him?

A. He talked about it ought to be his homestead.

Q. It ought to be his homestead?

A. That is what he said. He talked about it, but I didn't pay any attention to that, because I bought the land in good faith, and I thought my title was all right.

Q. You knew this, that he told you that he ought to have the land?

A. That was long after I had bought it.

255 Mr. Dunn: I desire to interpose an objection to all this testimony as to what conversation was had with Mr. Donovan, or what took place with him subsequent to the purchase of this land, by the witness; and I move to strike out the same as immaterial and incompetent.

Q. You never heard that he claimed the land before you bought it? A. No, sir.

Q. Didn't Mr. Brown say that there was a suit involving the title to the land, pending? A. No, sir.

Q. You never heard of the pendency of this suit?

A. No, sir. No, sir, I did not.

Re-direct Examination

By Mr. Dunn:

Q. You had never heard of any suit?

A. No, sir; not until after I bought. Mr. Graham told me there had been an action in court, and that Donovan was beat. That was all I ever heard of it.

Q. That was about Thompson's suit? A. I suppose so.

Mr. Dunn: I now introduce in evidence the final decree in the matter of the estate of O. C. Erichsrud, deceased, being the decree of the Probate Court of Faribault County, dated November 7th, 1888. The same being duly certified by the judge of probate, together with the certificate of the judge of probate and also the certificate of the recording of said paper.

Said paper writing is marked defendant's Exhibit 5.

256 Mr. Gilman: I object to the same as immaterial, incompetent and irrelevant.

It is agreed between counsel that Exhibit 5 being the final decree in probate court, and the original thereof, that a copy of the same may be substituted in the record in place and with the force of the original.

Mr. Dunn: I also desire to introduce in evidence the filing on the back of the record on defendants' Exhibits 1 and 2.

William E. C. Ross, a witness of lawful age, produced and sworn on the part of the defendants, testifies as follows:

Examination in Chief.

By Mr. Dunn:

Q. Where do you reside ? A. Blue Earth City.

Q. How long have you resided here? A. Since 1872.

Q. What is your business now, and what has it been?

A. Banker.

Q. Were you acquainted with Ole C. Erichsrud in his life time? A. Yes, sir.

Q. Did you know his children Mabel, Julia and Ada?

A. Yes, sir.

Q. Were you ever appointed guardian for either of those children? A. I believe I was.

Q. For which one of them, do you remember?

A. All of them.

Q. For all of them? A. I think so.

Q. You succeeded Mr. Neal in his guardianship, did you not?

A. Yes, sir.

Q. Did you as guardian for those children have any-
257 thing to do with the east half of the northwest quarter of section 35, township 101, range 28?

A. I did, yes, sir.

Q. Did you have that land in your possession and charge at any time? A. Yes, sir, I did.

Q. For the children? A. Yes, sir.

Q. In company with Mrs. Erichsrud, the mother of the children? A. Yes, sir.

Q. For how many years?

A. I was appointed the 28th day of October, 1891.

Q. How long did you discharge your duties?

A. I made a final accounting the 18th of July 1894.

Q. And you were discharged? A. Yes, sir.

Q. From your duties? A. Yes, sir.

Q. As guardian? A. Yes, sir.

Q. Did you take care of the land in connection with Mrs. Erichsrud's interest in it and the children's interest during those years? A. Yes, sir

Q. What did you do in that connection? A. I rented it.

Q. You rented it? A. Yes, sir.

Q. And took charge of the grain? A. Yes, sir.

Q. Was there anyone else in possession, except yourself and Mrs. Erichsrud on that land during that time, except the tenant that was under you? A. No, sir, there was not.

Q. There was nobody but yourself in possession? A. No, sir.

Q. Or in control of it? A. No, sir.

Q. Were you ever on the land?

258 A. No, sir, not to my knowledge. I might have been on it.

Q. You know it by description? A. That is all.

Q. From your tenant? A. Yes, sir.

No cross examination.

Defendants rests.

Michael Donovan, recalled on the part of the plaintiff, in rebuttal, testifies as follows:

Examined

By Mr. Gilman:

Q. Mr. Donovan, did you hear the testimony of Mrs. Erichsrud, as to your offering to buy this tract of land in question, and offering her $19.00 an acre for it. Did you hear that testimony? A. Yes, sir, I heard it.

Q. What have you to say with reference to the conversation you had with Mrs. Erichsrud, in regard to this land? How did it come about, and what was said?

A. She wrote me a letter before she sold the land to Mr. Woodwick; she wanted me to come in and see her—

Mr. Dunn: I object to the witness testifying as to the letter, because it is not the best evidence, but the letter itself is the best evidence.

259 Q. Have you got the letter?

A. No, sir, I have not got the letter.

Q. Where is it? A. It was destroyed. I didn't save it.

Q. You didn't save it? A. No, sir.

Mr. Dunn: We object to the testimony until the letter is accounted for, upon the ground that this is not the best evidence of the writing.

Q. You may state about the letter, what became of it?

A. I didn't save it, but it was destroyed, of course, in my pocket, and got torn I suppose. I didn't save it. I didn't pay any attention to the letter, just let it go. I waited for a while

and then I came to town after she wrote to me, I came in in a few days and came to see her.

Q. What did the letter request you to do?

A. The letter requested me, it said she would like to see me, she would like to give me the first chance to sell me that land.

Q. Did you go to town and see her?

A. Yes, sir. I did go and see her.

Q. What took place then?

A. I went to the house and says to her, "You wrote me a letter," and she says, yes, she said, "You are an old man, and I want you to have that land and give you a chance for to buy it." I said, "Mrs. Erichsrud, I couldn't buy my own homestead. You know it is in dispute." She said, "If you buy the land, if you beat the company, you will get the money back." I said, "I don't want to buy it, but I tell you, if I am beat, if the court beats me, may be, I would like to buy it if you have it to
260 sell. Then if I was beat in court, if she had not sold the land I would like to buy it." Then I says, "I have a lot in town, and we might make a trade if I was beat." At this time her daughter Mable was there and she must have heard some of the conversation I had; she and her mother, her mother and I was at the house, she was by there part of the time. I stayed there but a few minutes and left her.

Q. That is the only conversation you had with her?

A. Yes, sir, that is the only conversation I had with her about the land.

Q. About the land?

A. Yes, sir, she wrote me a letter about the land.

Cross-Examination

By Mr. Dunn:

Q. When was this?

A. It was sometime prior, before she sold the land.

Q. No, no, when was it, what time was it?

A. It must have been, it must have been over, it must have been three, two or three years ago this spring. No, I can't say certainly.

Q. You can't say certainly?

A. No, sir, I couldn't say, it was either two or three years this spring.

Q. What month was it?

A. What month was it? It was in the spring time of the year, in the spring of the year, in the spring.

Q. Where did you see Mrs. Erichsrud?

A. I saw her at her own house. I went to her own house, because she wanted to see me. She wrote to me, she wrote me a letter—

Q. Don't amplify so much, That is enuogh.

261 A. I went to her house. She wanted to see me.

Mr. Dunn: I want to ask Mr. Donovan another question, although it is not cross-examination, but I may as well ask him now.

Mr. Gilman. Are you going to call him as your witness? Do you make him your witness?

Mr. Dunn: No, I will call him in connection with his former testimony, as examination, now that he is on the stand. I don't need to make him my witness formally.

Q. You tried to buy this land of the railroad company, did you not, before they sold it to Mr. Thompson?

A. The agent was there, and offered me the land for $7.00 an acre.

Q. And you tried to buy it? A. No, sir.

Q. You didn't try to buy it? A. No, sir.

Q. Didn't you testify in the district court in this county, in the suit that you brought against Thomas Thompson that you tried to buy that land of Mr. Rasmussen?

A. Mr. Rasmussen came to me and told me—

Q. Never mind about that. Didn't you testify to that?

A. I don't know whether I did; it was so long ago. I could have got it for $7.00 an acre.

Q. Didn't you testify in the district court in this county that you tried to buy that land?

A. I don't believe I did. The agent offered it me, I know he wanted me to buy it. I don't believe I did. He wanted me to buy it.

Q. I didn't ask you whether he wanted you to buy it. I asked you whether you didn't testify to that?

262 A. I can't remember, because it is so long ago.

Q. You can't remember?

A. No, sir, I can't remember. I know that I didn't try to buy it.

Q. Did you ever try to buy it?

A. To the best of my knowledge and belief, I don't think I ever tried to buy it of the railroad company, because—

Q. Never mind about your because, I don't care about your because. We will never get through. Just say yes or no. You say you can't remember? A. No, sir.

Q. You had a law suit with Mr. Thompson, didn't you?

A. You know it.

Q. I know it, but Judge Lochren doesn't know it, and we are talking for Judge Lochren's benefit. You had a law suit with Mr. Thompson, didn't you, Mr. Donovan, you brought an action against him, to dispossess him from the land, to dispossess Thomas Thompson? A. Yes, sir.

Q. You did commence that case? A. Yes, sir.
Q. And that case was decided against you? A. Yes, sir.
Q. There was a judgment? A. Yes, sir.
Q. And you never appealed from that judgment?
A. No, sir.
Q. You went to work and paid the costs, and paid the judgment and stopped it?
A. Yes, sir, but I don't know what that has to do with this case.

Mr. Dunn: That is not for you to say whether it has or not.

Q. Do you know when the road was laid out between
263 these two eighties, when it was laid out by the authorities? A. I should think. You have got the record.
Q. About when was it?
A. I don't know, but the road was laid out before Mr. Thompson bought the place; I know that much.
Q. Mr. Bugge was one of the supervisors?
A. I don't know. I know Mr. Ogilvie was chairman. The road was laid out before Mr. Thompson bought the tract.
Q. Do you know whether you got any damages for the laying out of that road?
A. We never asked any damages for a road on a section line.
Q. I asked you the question whether you got any damages?
A. I never asked for any damages, because I supposed—
Q. Never mind about that, never mind what you supposed, don't argue with me?
A. I never asked any. I didn't get any damages, and I never claimed any damages.
Q. Then just say so then.
A. I never claimed any damages, I didn't get any damages; I didn't want them.
Q. After the termination of that law suit you never went upon that land after that, did you?
A. Yes, sir, I went on it to open the ditch and keep it open.
Q. You went on it to keep the ditch open?
A. I dug a ditch and kept it open.
Q. Who was in possession of the land then?
A. Mr. Thompson was in possession of the land then. I kept the ditch open right along.
264 Q. That was a ditch that drained your own land?
A. Yes, sir.
Q. That was all the way you had to drain your own land?
A. Yes.
Q. It drained right down on to that eighty? A. Of course.
Q. Wasn't that the only way you had to drain your own land? A. It was the only run way for the water.

Q. When you opened the ditch on that eighty, you opened it for the purpose of draining your own land, and draining it down there? A. It drained that land too.

Q. You didn't do it to drain that land?

A. I did it on that eighty because it was swampy and wet.

Q. But you were draining your own land?

A. I did it with the other.

Q. You were draining your own land, were you not?

A. With the other too. It drained a part of the swamp on both eighties.

Q. Didn't the water remain on that eighty? A. No, sir.

Q. Would that ditch drain it off that eighty?

A. The ditch is there yet to drain this eighty off.

Q. Where does it drain it to?

A. There is a creek runs from the corner from that eighty down to the river, a kind of a pathway for the water.

Q. Was that all you did? A. That is all.

Q. What year did you dig that after Mr. Thompson was in possession there? A. What year?

Q. Yes, after Mr. Thompson was in possession what year did you dig the drain? A. I don't understand.

265 Q. What year was it after Mr. Thompson was in possession that you dug any drain there?

A. I dug the ditch. The ditch was dug when Thompson was on the land after he bought it. I dug the ditch after he came on to the place.

Q. You dug it after that?

A. After Thompson got it I dug the ditch.

Q. There was no ditch there before that? A. No, sir.

Q. Who helped you with that ditch? A. Mr. Curtis.

Q. Didn't Mr. Thompson help you to dig the ditch?

A. No, sir, Mr. Thompson didn't help me.

Q. What year was it?

A. I think it was the first year that Thompson came on to the place.

Q. Was it before or after your law suit with him?

A. I couldn't say as to that, but it was when Thompson was a resident on the land that I dug the ditch.

Q. Did he live on that land?

A. No, sir, he didn't, he didn't live on that land, he lived on the adjoining land.

Q. How much did Thompson break up on that land?

A. Thompson?

Q. Yes. A. I never surveyed it.

Q. I don't suppose you did, but about how much did he break up?

A. I should think—I shall have to think how much Mr. Moore broke. He broke some of that land besides Mr. Thompson. I don't know how much Mr. Thompson broke.

Q. It is all broke up now pretty much?

A. I think there is very near sixty-five acres under cultivation.

Q. What year did you do your last breaking on it?

266 A. My last breaking on it was in 1871.

Q. 1871?

A. Yes, sir, the last breaking I done was in 1871. That is the last breaking I done.

Plaintiff rests in rebuttal.

Anna Erichsrub, recalled on the part of the defendants in surrebuttal, testifies as follows:

Examined

By Mr. Dunn:

Q. Did you hear Mr. Donovan's testimony given just now?

A. Yes.

Q. Does that refresh your memory now about this conversation?

A. Well, Mr. Donovan wrote me a letter about the land; and then I wrote him about it a letter back again. He came—

Q. Have you the letter he wrote you?

A. No, he wrote two letters, he wrote two letters.

Q. Do you know where they are?

A. No, sir, I don't. I didn't think they were of any importance.

Q. Are they in existence?

A. No, sir, I don't think they are.

Q. You think they are destroyed? A. Yes.

Q. Can you tell us what the contents of his letters were that he wrote to you?

A. He wanted to buy the land and give a quit-claim.

267 I didn't know a quit claim from any other ordinary deed. So I wanted to see Mr. Brown so as to ask him about this quit claim.

Q. Did Mr. Donovan then come to see you?

A. Then Mr. Donovan came to see me.

Q. He came to see you? A. Yes, sir.

Q. You wrote him a letter after he wrote?

A. Yes, sir, Mr. Donovan wrote me a letter first about the land.

Q. Then you wrote to him?

A. Yes, sir, I told him I didn't know about the deed.

Q. Did you tell him as he testifies, in your letter that you would give him the first chance for the land?

A. I told him if he would pay me what I wanted for it he could have it.

Q. Something of that kind?

A. Something of that kind; the same as anyone else.

Q. But you are positive you didn't write to him until he wrote to you? A. He wrote to me.

Q. First? A. Yes, sir.

Q. You are positive of that?

A. I am quite positive of that.

Q. Did you know Mr. Donovan at that time? A. No.

Q. You never did know Mr. Donovan until that time?

A. No, I never knew him.

Q. Did he come to see you?

A. Yes, sir, he came to see me.

Q. You heard his testimony about talking about a law suit; did he talk about a law suit to you when he was there?

A. I don't know. I didn't know anything about a
268 law suit. I didn't know there was one at the time.

Q. Did he tell you at that time about having a law suit about that land, and if he got beat or anything of that kind? A. No, sir, I don't remember anything about that.

Q. You heard what he testified to about that? A. Yes, sir.

Q. Did he tell you anything about that?

A. No, sir, I don't know what he told me about a law suit. I don't know he told me anything about that law suit.

Q. Or about any law suit? A. No.

Mr. Dunn: Mr. Reporter, will you read the testimony of Mr. Donovan that he gave a short time ago upon this matter?

The testimony of Mr. Donovan, as found on pages 259 and 260, beginning at the last answer on page 259 is now read by the reporter.

Q. Did you tell him that, what the reporter has just read, did you say that? A. No, sir, I did not.

Q. Mr. Donovan testifies as follows: "I went to the house and says to her 'You wrote me a letter,' and she says, "Yes," she said 'You are an old man, and I want you to have that land and give you a chance for to buy it.'" What do you say to that, did you say that to him? A. No, sir I did not.

Q. Did he say in answer to that, "Mrs. Erichsrud, I couldn't buy my own homestead, you know it is in dispute."

A. No, sir, I am positive he didn't say that, because I would have remembered it, because—

Q. You are positive he didn't say that? A. Yes, sir.

Mr. Gilman: She didn't say that?

269 Mr. Dunn: Yes she did.

Mr. Gilman: She answered your question, but she says she didn't recollect.

Mr. Dunn: No, she said she would have remembered it.

The last answer of the witness is read over by the reporter as follows: "No, sir, I am positive he didn't say that, because I would have remembered it, because—

Witness. I didn't know that the land was in dispute.

Q. Did he say that, or did he not say it?

A. I wouldn't say positively; but I am quite sure he never said it, because I would have known then that the land was in dispute, and I didn't know it. You told me here they disputed that for ten years. I didn't know anything about it until the papers came.

Q. Did you say "If you buy the land, if you beat the company, you will get the money back"?

A. No, I didn't know anything about it, I didn't know anything about that business. That I would get the money back and pay him.

Q. Did you tell him anything about that?

A. No, sir, I didn't because I didn't know anything about this. I didn't know it was in dispute at all. I shouldn't have sold it if I had.

Q. Did he say "I don't want to buy it, but I tell you, if I am beat, if the court beats me may be, I would like to buy it if you have it to sell. Then if I was beat in court if she had not sold the land I would like to buy it." Did he say anything of that kind? A. No.

270 Q. Did he say "I have a lot in town, and we might make a trade if I was beat"? Did he say anything of that kind?

A. He wanted me to take a lot if he gave me so much money, in part.

Q. After having heard that testimony, Mrs. Erichsrud, are you still confident and positive that no such conversation occurred?

A. There was no such thing as that talked about, and as far as that part of it is concerned it never was, because, as I said before, I didn't know this was in court at all.

Q. He never informed you it was in court? A. No, sir.

Q. And you knew nothing about its being in court until you were served with the summons?

A. No, sir, that is the time.

Q. Or of any such claim? A. No such claim, no, sir.

Q. This was after you sold it that you got the summons?

A. Yes, sir.

Q. At that time you knew nothing about the law suit?

A. No, sir.

Q. At the time you sold it to Mr. Woodwick you knew nothing about this law suit? A. No, sir.

Q. Or about any claim at all? A. No, sir.

No cross-examination.

Mr. Dunn: I introduce in evidence a copy of the deedings and the judgment in the case of Michael Donovan against Thomas S. Thompson, brought in the District Court of the Sixth Judicial District, Faribault County. I have simply the
271 copies, they are not certified to.

Mr. Gilman: Have you got a copy of the answer and of the complaint?

Mr. Dunn: Yes.

Mr. Gillman: And the decision?

Mr. Dunn: Yes. The complaint, answer, reply and the judgment.

Mr. Gilman: I object to them on the ground that they are immaterial and irrelevant.

Mr. Dunn: You don't object to them upon the ground that they are not certified to?

Mr. Gilman: No. I have got a certified copy myself.

Said paper writing is now marked Defendants' Exhibit 6.

It is agreed between respective counsel that the documents marked Defendants' Exhibit "A", and papers attached thereto, being certain copies of papers from the General Land Office, may be introduced in evidence by counsel for Defendants, subject to the objection of counsel for complainant that the same are irrelevant and immaterial to any issue in the cause.

Testimony closed.

272 DEFENDANTS' EXHIBIT 1.

This Indenture, made this 24th day of May, in the year of our Lord one thousand eight hundred and ninety-nine, between Anna Erichsrud, surviving widow of O. C. Erichsrud, deceased, Addie J. Erichsrud, Julia P. Erichsrud and Mabel Erichsrud, children and only lawfull issue of said deceased, all unmarried, parties of the first part, and Louis K. Woodwick, all of Faribault Co., Minn., party of the second part, witnesseth, that the said parties of the first part, in consideration of the sum of Two thousand ($2000.00) Dollars, to them in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, do hereby Grant, Bargain, Sell and Convey, to the said party of the second part, his heirs and assigns, Forever, all that tract or parcel of land lying and being in the County of Faribault and State of Minnesota, described as follows, to wit.

The East half of the Northwest quarter of Section Thirty-five "35" in Township one hundred and one "101" North, of Range Twenty-eight "28" West, containing 80 acres more or less.

(Two $1.00 revenue stamps.)

To Have and to Hold the Same, together with all the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, to the said party of the second part, his heirs and assigns, Forever. And the said parties of the first part, for themselves, their heirs, executors and administrators, do covenant with the said party of the second part, his
273 heirs and assigns, that they are well seized in fee of the lands and premises aforesaid, and have good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances; and the above bargained and granted lands and premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said parties of the first part will Warrant and Defend.

In Testimony whereof, the said parties of the first part hereunto set their hands and seals the day and year first above written.

ANNA ERICHSRUD, [Seal]
ADDIE J. ERICHSRUD. [Seal]
MABELLE H. ERICHSRUD, [Seal]
JULIA P. ERICHSRUD, [Seal]

Signed, Sealed and Delivered in presence of;
J. N. Brown,
F. P. Brown.
Witnesses:

State of Minnesota,
County of Faribault—ss.

I, F. P. Brown, a Notary Public, within and for said County, do hereby certify that on this 24th day of May, A. D. 1899, personally came before me Anna Erichsrud, Addie J. Erichsrud, Julia P. Erichsrud and Mabel Erichsrud, to me well-known as the same persons described in and who executed the foregoing deed, and they each acknowledged that they executed the same freely and voluntarily.

[Notarial Seal] F. P. BROWN,
Notary Public.

274 Office of Register of Deeds,
County of Faribault, Minnesota.

I hereby certify that the within Deed was filed in this office for record on the 24th day of May, A. D. 1899, at 2 o'clock p. m., and was duly recorded in Book 27 of Deeds, page 390.

K. F. WOODARD,
Register of Deeds.

Taxes paid and transfer entered this 24 day of May, A. D. 1899.

G. B. FRANKLIN,
County Auditor.

275 DEFENDANTS' EXHIBIT 2.

Southern Minnesota Railway Co.,
To O. C. Erichsrud.

No. 112.

Warranty Deed.

This Indenture, made this Twentieth day of March in the year of our Lord one thousand eight hundred and Eighty-eight between the Southern Minnesota Railway Company, party of the first part, and O. C. Erichsrud, of Blue Earth City in the County of Faribault and State of Minnesota, party of the second part; Witnesseth, that the said party of the first part, for and in consideration of the sum of Four Hundred and Eighty Dollars, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised, released, aliened and conveyed, and by these presents doth grant, bargain, sell, remise, release, alien and convey forever, all that tract, piece or parcel of Land situate, lying and being in the County of Faribault, State of Minnesota, known and described as follows:

The East half of the Northwest Quarter of Section No. Thirty-five (35) in Township No. One hundred and One (101) North of Range No. Twenty-eight (28) West of 5th p. m., containing, according to the United States Survey Eighty Acres, more of less: Reserving and excepting therefrom, how-
276 ever, a strip of land extending through or into the same (or so much of such strip of land as may be within said described premises), of the width of one hundred feet; that is to say, fifty feet on each side of the center line of the Southern Minnesota Division of the Chicago, Milwaukee and St. Paul Railway or any of its branches, in case the said railway or any of its branches has been constructed on, or over, or within fifty feet of, any part of said described premises. Together with all and singular the hereditaments and appurtenances

thereunto belonging, or in any wise appertaining; and all the estate, right, title, interest, claim or demand whatsoever of the said party of the first part, either in law or equity, either in possession or expectancy of, in and to the above bargained premises, as above described, and their hereditaments and appurtenances.

To have and to hold the said premises as above described, with the hereditaments and appurtenances, unto the said party of the second part, and to his heirs and assigns forever.

And the Southern Minnesota Railway Company for itself, its successors and assigns, doth covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns, that the above bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons, lawfully claiming the whole or any part thereof, it will forever warrant and defend except taxes for 1884 and subsequent years.

In Testimony Whereof, the said Southern Minnesota Railway Company hath caused these presents to be signed by its
277 President and attested by its Secretary, and its corporate seal to be hereunto affixed, the day and year first above written.

[Corporate Seal] SOUTHERN MINNESOTA,
RAILWAY COMPANY,
By Roswell Miller, President.

Attest: P. M. Myers, Secretary.

Signed, Sealed and Delivered in Presence of;
H. G. Haugan,
Peter S. Burghart.

State of Wisconsin,
County of Milwaukee—ss.

Be it known, that on the 20th day of March, A. D. 1888, before me, the undersigned a Notary Public, duly commissioned in and for said County, and duly authorized to administer oaths and take acknowledgment of deeds, came Roswell Miller, President, and P. M. Myers, Secretary of the Southern Minnesota Railway Company, who by me being duly sworn, did each depose and say: That they are respectively President and Secretary of the said Company; that they know the Seal of said Company; that the Seal affixed to the foregoing instrument is the Corporate Seal of said Company, and was affixed by authority of said Company, and that they signed their respective names thereto as President and Secre-
278 tary by the like authority; and they severally acknowledged the execution thereof to be their free act and

deed, and the free act of the said Southern Minnesota Railway Company, for the purposes therein expressed.

And I certify, that they are personally known to me to be the persons they are above described to be, and who executed this instrument.

And I further certify, that the foregoing instrument is executed according to the laws of Minnesota.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal on the day and year above written.

[Notarial seal] WILLIAM S. MILLIGAN,
Notary Public.

No. 112.
Warranty Deed.
Southern Minnesota Railway Co.
To
O. C. Erichsrud.

State of Minnesota,
County of Minn.—ss.

I hereby certify that the within deed was filed in this office for record, on the 8th day of June, A. D. 1888, at 11-½ o'clock a. m., and duly recorded in Book 16 of Warranty Deeds,
279 on pages 395.

M. M. FREER,
Register of Deeds.

Taxes paid and transferred June 8, 1888.

N. WHITFIELD,
Co. Auditor.

280 DEFENDANTS' EXHIBIT 3.

1. Abstract of Title to the East half of the North West quarter of Section 35 in Township 101, Range 28, in Faribault County, Minn.

2. State of Minnesota
To
Southern Minnesota R. R. Co.
Certified List.
Dated December 24th, 1875.
Filed March 15th-1876 at 3, P. M. Certified to by State Auditor that said list has been compared with the official list on file in his office certified to the State by the Land Commissioner of the General Land Office and transmitted by the Interior Department of the General Government that the same is a correct list of the lands certified to said State and by said State conveyed to the Southern Minnesota R. R. Co by Deed dated August 8th, 1871, includes the land described in the caption hereof.

3. Southern Minnesota R. R. Co.
To
Samuel B. Ruggles and
Albon P. Man, Trustees.
Trust Deed.
Dated August 8th-1864.
Filed Aug. 28th-1867, at 11, A. M.
in Book I, of Mortg's page 245.
Consideration $1.00 Conveys all the lands acquired or which may be hereafter acquired by the party of the first part through or under any land grant or other act of the Congress of the United States or of the said State of Minnesota.

	Southern Minnesota R. R. Co.	1st-Mortgage.
4.	To	Dated Sept. 24th-1867.
	Samuel B. Ruggles and	Filed Aug. 25th-1868, at 3, P. M.
	Albon P. Man, Trustees.	in Book I of Mortg's page 552.

Consideration $1.00, Conveys all lands which may be hereafter acquired by the party of the first part, or to which it shall be entitled through or under any land grant or other act of the Congress of the United States or of the said State of Minnesota, for or in respect to the construction of said road to the extent of one hundred and fifty miles westward, from the present terminus of said completed road at Rushford, thirty miles from the Mississippi river.

	Southern Minnesota R. R. Co.	2nd-Mortgage.
5.	To	Dated Sept. 24th-1867.
	Samuel B. Ruggles and	Filed Aug. 25th-1868, at 3, P. M.
	Albon P. Man, Trustees.	in Book I, of Mortg's page 564.

Consideration $1.00 Conveys same as No. 4.

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	Southern Minnesota R. R. Co.	Power and Covenants.
6.	To	Dated March 13th-1868.
	Samuel B. Ruggles and	Filed Sept. 19th-1872, at 8, A. M.
	Albon P. Man, Trustees.	In Book O, of Mortg's page 397.

Relating to Mortgage of August 8th-1864 and Special Trust in setting apart one hundred thousand acres of land to pay bonds to the amount of $450,000. The tenor and effect of the same are that the Trustees are allowed to convey without requiring the R. R. Co. joining in the conveyance.

	Southern Minnesota R. R. Co.	Power and Covenants.
7.	To	Dated March 13th-1868.
	Samuel B. Ruggles and	Filed Nov. 19th-1872, at 9, A. M.
	Albon P. Man, Trustees.	In Book O, of Mortg's page 539.

Description same as No. 6 next above.

	Southern Minnesota R. R. Co.	Decree.
	By United States Circuit Court	Dated May 27th-1874.
8.	To	Filed Dec. 11th-1884, at 9, A. M.
	Samuel B. Ruggles and	in Book 3, of Mortg's page 433.
	Albon P. Man, Trustees.	Order to sell the premises mentioned in

Mortgages dated September 24-1867, at public auction by or under the direction of John Y. Page one of the Masters of this court.

	Southern Minnesota R. R. Co.	Resignation and appointment.
	and Samuel B. Ruggles and	Dated March 22nd-1878.
	Albon P. Man, Trustees.	Filed Apr. 11th-1876, at 8, A. M.
9.	To	in Book T, of Mortgages page 10.
	Hermann H. Cammann.	Samuel B. Ruggles resigns and Her-

mann H. Cammann is appointed Trustee in Mortgages dated Sept. 24-1867.

	Southern Minnesota R. R. Co.	Modification of Decree.
	By U. S. Circuit Court	Dated Dec. 27th-1876.
10.	To	Filed Dec. 11th-1884, at 9, A. M.
	Albon P. Man and	in Book 3, of Mortg's page 443.
	Hermann H. Cammann.	Order modifying decree of May 27th-

1874 that is to say Plaintiffs may proceed to sell the Mortgaged premises described in said decree entire and as one parcel, under and by virtue of and to satisfy the second mortgage therein described.

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	Southern Minnesota R. R. Co.	Report of Sale.
	By John Y. Page	Dated Feb 10th-1877.
	Master in Chancery	Filed Dec 11th-1884, at 9, A. M.
11.	To	in Book No. 3 of Mortg's page 445.
	Albon P. Man and	
	Hermann H. Cammann.	Conveys the premises mentioned in de-

cree of May 27th-1874 as modified by a further order of said Court dated Dec. 27th-1876, to satisfy the said second Mortgage.

Southern Minnesota R. R. Co. — Confirmation of Sale.
By U. S. Circuit Court. — Dated Feb. 16th-1877.
12. To — Filed Dec. 11th-1884, at 9, A. M.
Albon P. Man and — in Book No. 3 of Mortgages page 447.
Hermann H. Cammann. — Order confirming Master's report
of Sale.

Southern Minnesota R. R. Co. — Certificate of Mortgage Sale.
By John Y. Page — Dated Feb 14th-1877.
Master in Chancery — Filed Jan. 29th-1886, at 3, P. M.
13. To — in Book 12, of Deeds page 241.
Albon P. Man and
Hermann H. Cammann. — Consideration $1 00
Conveys all the remaining land and right title or interest in lands embraced in two mortgages now under foreclosure and still owned by said company or to which it is or may be in any way entitled, under the respective land grants, Acts of Congress and of the State of Minnesota, being all the lands and right to lands acquired or which may be acquired through or under any land grant act.

Albon P. Man and — Deed.
Hermann H. Cammann, Trustees. — Dated March 3rd-1877.
14. To — Filed Feb. 2nd-1886, at 9, A. M.
The Southern Minnesota Ry. Co. — in Book 12, of Deeds page 249.
Consideration $1.00. Conveys same as No. 13, to which reference is given for more complete description of said hereby granted premises.

Southern Minnesota Ry. Co. — Mortgage.
To — Dated January 1st-1879.
Albon P. Man and — Filed Feb. 3rd-1880, at 9, A. M.
Hermann H. Cammann and — in Book V of Mortg's page 518.
15. Farmers' Loan and Trust Co. — Consideration $1 00 &
Conveys all lands owned by said Company.

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Farmers Loan and Trust Co. — Satisfaction of Mortgage.
and Albon P. Man, and — Dated April 27th-1880.
Hermann H. Cammann. — Filed July 27th-1880, at 21/2 P. M.
16. To — in Book X of Mortgages page 73.
Southern Minnesota Ry. Co. — Discharges Mortgage dated
January 1st-1879.

Albon P. Man and — Satisfaction of Mortgage.
Hermann H. Cammann, Trustees. — Dated July 26th-1881.
17. To — Filed Sept. 15th-1881, at 2, P. M.
Southern Minnesota R. R. Co. — in Book X of Mortg's page 358.
Discharges First Mortgage dated September 24th-1867.

Southern Minnesota R. R. Co. — Appointment.
and Albon P. Man, Trustee. — Dated Oct. 20th-1881.
18. To — Filed Jan. 19th-1882 at 2, P. M.
Peter M. Myers — in Book X, of Mortgages page 473.
Peter M. Myers is appointed Trustee in place of Samuel B. Ruggles, deceased, in Mortgage dated August 8th-1864.

Albon P. Man — Resignation.
19. To — Dated October 21st-1881.
Peter M. Myers — Filed Jan. 19th-1882, at 2, P. M.
in Book X of Mortgages page 474. — Albon P. Man resigns as trustee in
Mortgage dated August 8th-1864

Southern Minnesota R. R. Co. — Appointment.
and P. M. Myers, Trustee, — Dated October 22nd-1881.
20. To — Filed January 19th-1882, at 2, P. M.
John Johnston — in Book X of Mortgages page 476.
John Johnston is appointed Trustee in place of Albon P. Man resigned in Mortgage dated August 8th-1864.

P. M. Myers and J hn Johnston, Trustees.
21. To
Southern Minnesota R. R. Co.
Satisfaction of Mortgage.
Dated Aug. 23rd-1886.
Filed Aug. 28th-1886, at 4, P. M.
in Book 5 of Mortg's page 577.
Discharges Trust Deed or Mortgage of August 8th-1864.

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Southern Minnesota Railway Co. by Roswell Miller, Pres., and P. M. Myers, Sec'y.
22. To
O. C. Erichsrud.
Kind of Instrument. Deed.
Dated March 20th, 1888.
Filed June 8th, 1888, at 11-1/2 A. M.
Recorded in Book "16" of Deeds page 395
Consideration $480.00
Description. Conveys same as in the caption hereof.

Ole C. Erichsrud, deceased, by Probate Court of Faribault Co. Minn.
23. To
Anna Erichsrud, Ada J. Erichsrud, Julia P. Erichsrud, and Mabel H. Erichsrud
Kind of Instrument. Final Decree.
Dated Novem er 7th, 1888.
Filed May 24th, 1899, at 2:30 P. M.
Recorded in Book "33" of Deeds page 542
Consideration $.....
Description: To Anna Erichsrud, surviving widow undivided 1/3 and to Ada J. Erichsrud, Julia P. Erichsrud and Mabel H. Erichsrud the remaining 2/3 of same as in the caption.

Anna Erichsrud "widow" and Ada J. Erichsrud, Mabelle H. Erichsrud and Julia P. Erichsrud, all unmarried.
24. To
Louis K. Woodwick.
Kind of Instrument. Warranty Deed
Dated May 24th-1899.
Filed May 24th-1899 at 2, P. M.
Recorded in Book "27" of Deeds.
Page 390.
Consideration $2000.00

Description: Conveys same as in the caption hereof. Rev. $2.00

25. Taxes paid.

26. Judgments none.

State of Minnesota,
County of Faribault—ss.

This certifies the foregoing statement from No. 1 to 26 inclusive to be a correct Abstract of title to the land described in the caption thereof as the same appears of record in the Office of the Register of Deeds of Faribault County, Minn. Including taxes and judgments.

Witness my hand this 28th day of August, 1899, at 1 p. m.

M. M. FREER,
Abstractor.

(10c. Revenue Stamp.)

285 DEFENDANTS' EXHIBIT 4.

This Agreement, made this 15th day of April, A. D. 1899, by and between Sam Carlyle, party of the first part, and Mrs. Anna Erichsrud, owner of the real estate hereinafter described, party of the second part:

Witnesseth: That the party of the first part hereby agrees to and with the party of the second part, for the consideration hereinafter named, to well and faithfully till and farm, during the season of farming in the year 1899 in a good and

husband like maner, and according to the usual course of husbandry, the following described premises and real estate, situate in the County of Faribault and State of Minnesota, viz.:

The East half (½) of the N. W. (¼) Sec. 35—101—28. And the said party of the first part hereby further agrees to sow and plant the said land, in such crops as the party of the second part shall direct, to wit: oats and wheat.

The party of the first part also agrees to furnish at his own cost and expense all proper and convenient tools, teams, utensils and farm implements and machinery (except as hereinafter otherwise provided) to carry on and cultivate said farm during said season, and to furnish and provide all proper assistants and hired help in and about the cultivation and management of said farm, and to farm and cultivate the said lands to the best advantage and according to his best skill and judgment, and maintain and keep up the fences so as to protect said crops from injury and waste, and to watch, care for, and protect the same, and protect the fruit and shade trees
286 thereon, and to cut no green trees, and commit no waste or damage on said real estate, and to suffer none to be done, and to crop and cultivate said lands and harvest and secure the crops in the best possible manner and in farmer like style during said season, and after taking off the crop to plow immediately in good and proper manner so much and such parts of said farm suitable, for a succeeding crop as shall be plowed at the time the party of the first part shall take possession thereof to till and crop; and to keep up and maintain in good repair all structures, cribs, fences, bridges, ditches and improvements on said farm, and generally do and perform all proper and ordinary work, labor, care and skill, requisite, usual or necessary, to farm and crop said premises in a proper manner and style, and to the best interest of the party of the second part, and further agrees not to remove any manure from said farm, and not to sell or remove, or suffer to be sold or removed, any of the produce of said farm or premises, of any kind, character or description, until the division thereof, without the written consent of the party of the second part.

Lessor is to furnish all seed for said land and to pay the one-half of machine price for threshing.

Carlyle is to work without charges all road tax.

(25c revenue stamp.)

In consideration of the faithful and diligent performance of the foregoing stipulations by the party of the first part, the party of the second part agrees, upon reasonable request thereafter made, to give and deliver on said farm, the
287 equal one-half (½) of all grains, vegetables, hay, so raised and secured upon said farm during said season.

Carlyle to deliver Erichsrud share of wheat and oats at elevator at Elmore. Hay to be stacked on farm by Carlyle and divided in stack.

SAMUEL CARLILE,
ANNA ERICHSRUD.

Louis K. Woodwick, having purchased the within described real estate, and as part of said purchase, and in consideration thereof, I do hereby assign, transfer and set over to him all my right title and interest in and to the within contract.

Dated at Blue Earth this 24th day of May, 1899.

ANNA ERICHSRUD.

(25c revenue stamp.)

288 DEFENDANTS' EXHIBIT 5.

Final Decree.

State of Minnesota,
County of Faribault.

In Probate Court,

Special Term, November 7th, 1888.

In the Matter of the Estate of Ole C. Erichsrud, Deceased.

It appearing to the Court now here, on satisfactory proofs and evidence, that the funeral charges, expenses of last sickness of said deceased, and the costs of administration of said estate, have been fully paid, and that all the debts existing against said deceased, as allowed by the Court pursuant to law, have also been fully paid and satisfied, or moneys reserved to provide for the same, and that said estate has been full administered, as by the final account of Peter Hagen and Fred P. Brown, administrators of said estate, duly audited and allowed by this Court, pursuant to due notice given and served, will appear, reference being had thereto.

And it further appearing, that due notice of the application for this final decree in said matter, assigning the estate to the persons thereto entitled by law, has likewise been duly given and served pursuant to the law in such case made and provided and decided.

And it further appearing, that the said deceased died
289 intestate, and the residue of said estate consists of the following described real estate, to wit:

Lots Six and Seven (6 & 7) in Block Nine (9) and Lots Four and Five (4 & 5) in Block Fourteen (14) all in Garretson's Addition to Blue Earth City, Faribault County, Minn. as said Lots and blocks are designated upon the Recorded Plat of said Addition.

Also the East half of the Northwest quarter of Section Thirty-five (35) in town one hundred and one (101) of Range Twenty-eight (28) West.

Also certain personal estate assigned by a separate order or Final Decree of even date herewith.

And it appearing that no part of said Real Estate was the Homestead of deceased and that said deceased was not the owner of any Homestead.

And it further appearing, that the following named persons are the persons entitled to said estate by law, viz: Anna Erichsrud, surviving widow of Deceased and Addie J. Erichsrud, Julia P. Erichsrud and Mabel H. Erichsrud, children and only lawful issue of said Ole C. Erichsrud, deceased.

Now, therefore, on the petition of the Administrators of said estate and pursuant to due notice and the law in such case provided:

It is ordered, adjudged and decreed, and this Court, by virtue of the powers and authority vested in the same by law, doth hereby order, adjudge and decree: That all and
290 singular of the above described real property be, and the same is hereby assigned to and vested in the above named persons forever, in the following proportions, to wit: To said Anna Erichsrud, surviving widow of deceased One undivided one third in fee simple of all the said real estate, and

To said Addie J. Erichsrud, Julia P. Erichsrud and Mabel H. Erichsrud, children of deceased, the remaining undivided two-thirds, in fee simple of all said Real Estate in equal shares and interests.

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said above named persons, and their heirs and assigns, forever.

[Seal] J. A. KIESTER,

Judge of Probate Court, Faribault County, Minn.

(10c Revenue Stamp.)

No. 34.

In Probate Court, County of Faribault.

In the Matter of the Estate of Ole C. Erichsrud, Deceased.

Final Decree Assigning Residue of Estate.

291 State of Minnesota,
County of Faribault—ss.

I, Josiah F. Winship, Judge of the Probate Court of said County, do hereby certify that I have compared the within Final Decree in the matter of said estate with the original Final Decree on file and of record in the Probate Office of the County aforesaid, and that the same is a true copy thereof, and of the whole of said original Final Decree and Record.

In Testimony Whereof, I have hereunto affixed the seal of the Probate Court of said County, and signed my name, this 24th day of May, A. D. 1899.

[Probate seal] JOSIAH F. WINSHIP,
Judge of Probate

Made, filed and recorded in Vol. E. page 21, Minutes of Court, this 7th day of Nov. 1888.

J. A. KIESTER,
Judge of Probate.

No. 7877.

Office of Register of Deeds,
Faribault Co., Minn.—ss.

I hereby certify that the within Instrument was filed in this office for record on the 24th day of May, A. D. 1899, at 2:30 o'clock p. m., and was duly Recorded in Book 33 of Deeds on pages 542-3-4.

K. F. WOODARD,
Register of Deeds.

292 DEFENDANTS' EXHIBIT 6.

Complaint.

State of Minnesota,
County of Faribault—ss.

District Court 6th Judicial District.

Michael Donavan,
vs.
Thomas S. Thompson.

This plaintiff for cause of action against this defendant alleges:

1st. That for many years he has been and now is settled upon the East Half (½) of the Northwest Quarter (¼) of Section

Thirty-five (35) in Township One Hundred and One (101) North of Range Twenty-eight (28) West in Faribault County, Minnesota; that settlement is not expressly or otherwise prohibited by Congress or any department of the general government; that said land is public land belonging to the United States; that the boundaries may be easily traced and the extent of plaintiff's claim easily known.

Plaintiff further alleges that he is an actual settler on said land or caused the same to be constantly occupied and has many and valuable improvements thereon, to wit: of the value of one hundred dollars, that he first settled upon said land in the year 1867 and has never abandoned the same for the period of Six months nor for any other period.

2nd. Plaintiff further alleges that in the Month of April 1885 this defendant unlawfully entered upon said prem-
293 ises and still unlawfully holds possession thereof and gives and claims that he has purchased the same to plaintiff's damage fifty dollars.

But plaintiff alleges that defendant has no right to or title in said premises and is not entitled to the possession thereof, but plaintiff has right to the possession thereof and the whole thereof.

Wherefore plaintiff demands judgment for the possession of said premises and of fifty dollars damages and for such other and further relief as may be just.

S. W. GRAHAM &
GEO. B. KINGSLEY,
Plff's Attorneys.

294 Answer.

Title of Case.

Now comes the above named defendant and for answer to the complaint herein, denies each and every allegation of said complaint except as the same hereinafter admitted qualified or explained.

This defendant expressly denies that the Plaintiff is now or ever was settled upon the Real Estate described in the Complaint; and denies that the Plaintiff is an actual settler on the said land or that he causes the same to be constantly occupied or that he has any valuable improvements thereon as alleged in said complaint or otherwise, and denies that the Plaintiff first settled upon said land in 1867 and has never abandoned the same as is in said complaint alleged or otherwise.

Defendant further alleges, that the land in the complaint described is not now and was not at the commencement of this action Public land belonging to the Government of the United States, as is alleged in the Complaint, and in that respect and behalf this defendant alleges the facts to be:

That heretofore to wit in pursuance and by authority of law the land in question was on the 21st day of March, A. D. 1871 duly certified by the Government of the United States, by the Commissioner of the General Land Office, to the State of Minnesota, and which said certificate was thereafter duly approved by the Secretary of the Interior of the United
295 States and on the 25th of March, A. D. 1871. And that the said land was thereafter and on the 8th day of August, A. D. 1871 by the State of Minnesota duly conveyed by deed of that date to the Southern Minnesota Railroad Company, a corporation duly organized and existing under the laws of the State of Minnesota.

That thereafter by conveyances duly made and by foreclosure of a Certain Mortgage covering the said land the same duly passed from the said Southern Minnesota Rail Road Company to the Southern Minnesota Railway Company, a corporation duly organized and existing under the laws of this State, that by subsequent conveyances to the said Southern Minnesota Rail Way Company and its Grantees, the said land became and was on the first day of October 1884 and now is the property of this defendant, with full and complete right to the possession thereof and of the whole thereof, that under and by virtue of his said conveyance and his right to the possession of said land, as aforesaid, this defendant has and did on the first of April, 1884 enter upon the said land and did take possession of the said land as his own property and not otherwise and that possession and entry is the only entry he has ever made on said land and is the same entry complained of by the Plaintiff herein.

III.

This defendant further answering herein alleges that in the month of April, A. D. 1885, the Plaintiff herein wrongfully and unlawfully entered upon the premises in the complaint described, and while the defendant was in the possession
296 thereof as alleged in the 2nd paragraph of this answer and then and there sowed upon about four (4) acres of the said land a mixture of foul and noxious seeds, which thereafter grew upon said land in the summer of 1885, and destroyed the crop of the defendant sowed thereon and which said foul and noxious seeds, have rendered the said four acres of ground unfit for cultivation and cropping until the same

shall be fully eradicated thereon, that said trespass and acts of the Plaintiff has damaged this defendant in the sum of Twenty-five Dollars.

IV.

Further answering defendant alleges, that during the spring and summer of 1885, the plaintiff wrongfully and unlawfully and wilfully permitted the stock, cattle and horses of the said defendant to enter upon and tread down eat and destroy the crops of the defendant growing and in shock after harvest, on the said land, to the damage of this defendant in the sum of Ten Dollars.

V.

Defendant further alleges that in the month of January, 1886, the Plaintiff herein wrongfully and unlawfully entered upon the premises in the Complaint described and took away and coverted to his own use the straw which had grown on the said land, and which was then and there stacked on the said land, and which had been so stacked and cared for by this defendant, and which was of the value of fifteen dollars, to the damage of the defendant of fifteen dollars.

VI.

297 Defendant further alleges that in or about the month of November, 1885, Plaintiff herein wrongfully and unlawfully entered upon the said land and with his teams, tools, servants and agents plowed up the soil of said premises, and at a time when it was unseasonable, and improper and in an improper manner, to the amount of six acres, to the damage of this defendant in the sum of fifty dollars. That during the said plowing the Plaintiff destroyed of certain flax seed which the defendant then had on said premises one bushel and a half of the value of one dollar and thirty-five cents, and to the damage of the defendant in the sum of One Dollar and thirty-five cents.

VII.

Defendant further alleges that in the month of September 1885 the said Plaintiff wilfully and maliciously entered upon the said premises and with himself his team, servants, agents and tools then and there cut down and carried away the grass then and there growing on said land, to wit: 15 tons of hay, of the value of Fifteen Dollars and to the damage of this defendant in the sum of Fifteen Dollars.

VIII.

Defendant further alleges that in the summer of 1885 the Plaintiff herein unlawfully entered upon the said premises and took and carried away and converted to his own use certain stone then and there being and part and parcel of the reality, to wit 1 cord of stone of the value of Ten Dollars, and to this defendant damage Ten Dollars.

298 IX.

Defendant further alleges that each and every of the foregoing acts of trespass committed by the plaintiff have been so done and committed wilfully and maliciously by the Plaintiff and with full knowledge by the Plaintiff of the rights and claims of this defendant—and with intent on the part of the Plaintiff to destroy and damage this Defendant, and to deprive him of the full or any use or benefit of his said premises, being the land in Complaint described—

Defendant therefor- alleges that he has been damaged by the said several acts of trespass or as aforesaid committed by the Plaintiff in the sum of Three Hundred Dollars—

Defendant therefor- Prays judgment that the said Plaintiff take nothing by this action, and that this Defendant have judgment enjoining and restraining the Plaintiff from further entering upon or trespassing upon the said premises, and that he have judgment against the plaintiff for the sum of Three Hundred Dollars damages and the costs of this action and for such other relief as may be just.

ANDREW C. DUNN,
Atty. for Defendant.

299 Reply.

Title of case.

The Plaintiff for reply to the new matter set up in defendants answer by way of Counter Claim or otherwise denies each and every allegation thereof except as herein after admitted to be true or qualified. He admits that he sowed about three acres of said land in spring of 1885 as he had a right to do in oats, the seed therefor being clean and free of foul or noxious seeds and that this defendant wrongfully and unlawfully harvested said Crop to the great damage of this Plaintiff to wit: Ten Dollars.

He denies that said land was damaged in any amount by reason of the sowing of said Crop of oats.

He denies that he during the summer of 1885 permitted his cattle or horses to destroy the Crops of this defendant thereon.

He denies that he ever entered upon said land to remove or to take any straw belonging to this defendant.

He admits that in the month of October 1885 he plowed in a good and workmanlike manner about Six acres of said land but did no damage thereto nor to any flax seed thereon.

He admits that in the month of September 1885 he cut about seven tons of hay thereon as he had a right to do, and no more, worth no more than two dollars.

He admits that removed five or six stones from the meadow ground to the benefit of the said premises and defend-
300 ants damage in any sum whatever.

He further denies that defendant by reason of the several acts set forth in his answer has been damaged in the sum of $300.00 or any sum whatever.

He further alleges that if said land was ever certified by the Government of the United States or said Railroad Company it was wrongfully and without authority of Law so Certified.

S. W. GRAHAM and G. B. KINGSLEY.
Plffs Attys.

301 Judgment.

Title of Case.

This action being at issue came on for trial and was duly tried by the Court without a jury at the June 1886 term of this Court held at Blue Earth City in the County of Faribault. The said Court having duly made and filed its decision in writing whereby it is found that the Plaintiff has no cause of action herein and that the Plaintiff is not entitled to recover herein and that the Southern Minnesota Railway Company is the legal owner of the lands described in the Complaint herein and the defendant herein is the equitable owner thereof and the whole thereof and is entitled to the possession thereof—and that judgment be entered accordingly. Now on motion of Andrew C. Dunn the attorney for the defendant herein it is ordered and adjudged that the Plaintiff is not entitled to recover in this action and is not entitled to the possession of the premises described in the Complaint to wit: the East Half (½) of the North West Quarter (¼) of Section thirty-five (35) in Township No. one hundred and one (10-) of Range No. twenty-eight (28) West, and lying and being in the County of Faribault and State of Minnesota—and that the defendant Thomas S. Thompson is entitled to the possession of said land and of the whole thereof.

And it is further ordered and adjudged that the De-
302 fendant Thomas S. Thompson do have and recover of the Plaintiff herein Michael Donavan the Sum of Twenty-Seven and 10/100 Dollars as and for his costs and disbursements in this action.

Witness the Hon. M. J. Severance Judge of the District Court aforesaid at Blue Earth City this 4th day of January A. D. 1888.

SMITH T. BARNES,
Clerk.

303 Extract from 165, U. S., 465-6; United States v. Winona & St. Peter R. R. Co. et als.

* * * * * * * * *

That on, before and for a long time after the certification of the lands in question to the State on account of the railroad grants it was uniformly held and ruled by the Secretary of the Interior and the other officers of the land department of the United States; (a) That the line of a railroad became and was definitely fixed so as to attach the grant to the odd numbered sections within the granted limits as soon as surveyed, staked out and marked on the face of the earth; and (b) that a homestead entry in all respects regular and legal excepted the land covered thereby from the operation of a railroad grant attaching during the existence of such entry; that the validity of a homestead entry was open to question by the company, and if it was shown that such entry was fraudulent or irregular in its inception, or that it had been abandoned before the right of the road attached, it was held not to except the land from the grant; but the burden of so doing was upon the company, and, in the absence of such proof, the entry being valid upon its face, was held to except the land from the grant, even though subsequently abandoned; and (c) That a preemption claim which may have existed to a tract of land at the time of
the attachment of a railroad grant, if subsequently
304 abandoned, and not consummated even though in all respects legal and bona fide was held not to operate to defeat the grant, but upon the failure of such claim the land covered thereby was held to inure to the grant as of the date when such grant became effective; and (d) That the rights under the grant attached to the lands in the granted and indemnity limits as of the same date, and that selection was not deemed necessary to attach the grant to any specific tract within the indemnity limits; and (e) That the lands within the indemnity limits were withdrawn at the same time as those within the primary or granted limits; * * * * and (g) That in pursuance of and in accordance with the aforesaid rules, the

grants to and for each and all of the land-grants railroad companies in the State of Minnesota were, before, at and for a long time after the certification of the lands in question administered."

303a DEFENDANTS' EXHIBIT "A".

C. H. B.
W. J. D.
St. J.
I. W. L.

F. ..... Department of the Interior
.....General Land Office,
.....January 1886.
..... I, Wm. A. I. Sparks, Commissioner of the General Land Office do hereby certify that the annexed papers are abstracts from tract books and copies of other papers and records on file in this office relating to the East Half of the Northwest quarter of section thirty-five (35) in township one hundred and one (101), of range twenty-eight (28), North of base line and West of the Fifth (5th) Principal Meridian, in former Jackson, now Worthington Land District, in the State of Minnesota, and that each of said papers—marked respectively 1, 2, 3, 4, and 5,—is a true and literal exemplification of the original to which it relates, viz:

1. Abstract from tract book relating to the section described, showing each entry, selection or filing appearing thereon.

2. List of selections, embracing parts of said section, presented by the Southern Minnesota Railroad Company Sept. 21, 1870.

3. List of lands certified to the State of Minnesota for the benefit of the Southern Minnesota Railroad Company March 25, 1871, so far as it relates to parts of said section.

304 4. Copy of diagram showing the ten and twenty-mile limits of the Southern Minnesota Railroad through ranges twenty-three to twenty-eight, inclusive.

5. Copy of homestead affidavit and application of Michael Donovan with register and receiver's rejection endorsed thereon..

In testimony whereof, I have hereunto subscribed by name, and caused the Seal of this office to be affixed, at the City of Washington, on the day and year above written.

[United States General Land Office Seal.]

WM. A. I. SPARKS,
Commissioner of General Land Office.

Examined
C. H. B.
A. B. J. F.

TOWNSHIP No. 101 N. — Range No. 28 W. 5 P.

1.	DESCRIPTION OF TRACT. Part of Section.	Section.	Township.	Range.	Contents. Acres.	100ths.	Rate per Acre. Dollars.	Cents.	Purchase Money. Dollars.	Cents.	Name of the Purchaser.	Date of Sale.	Number and C... P...
"Home"	N. E. ¼	35	101	28	160		1	25	10	00	Smith M. Demeree	November 1, 1864	
	N. E. ¼	"	"	"	160				Selected by Southern Minn. R. Road Act July 4 & 13, 186...				
"Home"		"	"	"	160		1	25	10	00	J. M. Matthews	December 2, 1864	
"Home"		"	"	"	160		1	25	10	00	Luman Barkley	June 21, 1866	
"Home"	S. E. ¼	"	"	"	160		1	25	10	00	John Dawley	November 7, 1864	
	N. W. ¼ & S. ½	"	"	"	480				Selected under Act July 4, 1866 for		S. M. R. R. App'd		Mc...
"Home"	S. W. ¼	"	"	"	160		1	25	10	00	Willard C. Brown.	December 2, 1864	

TOWNSHIP No. 101 N. Range No. 28 W. 5 P. M., District of Worthington, Minnesota.

OF TRACT.			Contents.		Rate per Acre.		Purchase Money.		Name of the Purchaser.	Date of Sale.	Number of Receipt and Certificate of Purchase.	TO WHOM PATENTED.
on.	Township.	Range.	Acres.	100ths.	Dollars.	Cents.	Dollars.	Cents.				
	101	28	160		1	25	10	00	Smith M. Demeree	November 1, 1864	2420	Final H. Cert. No. 1946, Aug. 11, 1871.
	"	"	160				Selected by Southern Minn. R. Road Act July 4 & 13, 1866					Approved Nov. 14, 1868.
	"	"	160		1	25	10	00	J. M. Matthews	December 2, 1864	2507	Canceled--Lee to R. and R. Dec. 5, 1868.
	"	"	160		1	25	10	00	Luman Barkley	June 21, 1866		Canceled--Lee to R. and R. Jan. 14, 1868.
	"	"	160		1	25	10	00	John Dawley	November 7, 1864	2489	Canceled June 21/69.
	"	"	480				Selected under Act July 4, 1866 for		S. M. R. R. App'd	Mch. 25, 1871,		List No. 2.
	"	"	160		1	25	10	00	Willard C. Brown.	December 2, 1864	2509	Canceled June 21/69.

308 Examined
C. H. B.
I. V. C.

2.

State of Minnesota
United States Land Office.

Jackson Sep. 21st, 1870.

The Southern Minnesota Railroad Company under and by virtue of an Act of Congress entitled "An Act making a grant of lands to the State of Minnesota in alternate sections, to aid in the construction of a Railroad in that State approved July 4, 1866," and under and in pusuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby makes and files the following list of selections of public lands, claimed by the said Company as enuring to the State of Minnesota for their benefit, and to which said State is entitled as "Indemnity Lands" under and by virtue of grants and provisions of said Act of Congress, and the location of the line of the route of part of the road of said Company and for the completed portion of said road, being the third section of ten miles of the same.

Parts of Sections.	Section.	Town.	Range.	Acres.
N. W. ¼ & S. ½.	35	101	28	480

I, T. C. Hoge, do solemnly affirm that I am the Land Agent of the Southern Minnesota Railroad Company; that the foregoing list of lands which I hereby select, is a correct list of a
309 portion of the public lands, claimed by the said Southern Minnesota Railroad Company as enuring to said Company, to aid in the construction of the Southern Minnesota Railroad from Houston, in the County of Houston and State of Minnesota, through the Counties of Fillmore, Mower, Freeborn, and Faribault, to the Western boundary of the State; for which a grant of lands was made by Act of Congress, approved July 4, 1866; that the said lands are vacant, unappropriated and are not interdicted Mineral nor Reserved Lands, and are of the character contemplated by the grant, being within the limit of 20 miles on each side of the line of route of said road, and being for the third section thereof from Houston aforesaid, ending at Lanesboro in the County of Fillmore in said State.

T. C. HOGE.

U. S. Land Office,
Jackson, Minn., Nov'b. 29/70.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Southern Minnesota Railroad Company, under the grant to the said Company by Acts of Congress, approved July 4th, 1866, and selected by T. C. Hoge, the duly authorized Agent, and we have

tested the accuracy of said list, by the Plats and Records of this Office, and that we find the same to be correct, and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed
310 Public Lands of the United States and within the limit of twenty miles on each side and that the same are not, nor is any part thereof returned and denominated as Mineral Land or Lands, nor claimed as Swamp Lands, nor is there any Homestead, Preemption, State or valid claim to any portion of said lands, on file or record in this Office.

We further certify that the foregoing list shows an assessment of the Fees payable to us, allowed by the Act of Congress approved July 1st, 1864, and contemplated by the circular of instructions dated January 24/67, addressed by the Commissioner of the General Land Office to Registers and Receivers of the United States Land Office, and that the said Company have paid to the undersigned, the Receiv r, the full sum of Two Hundred and two ($202) Dollars in full payment and discharge of said Fees.

E. P. FREEMAN, "Register,"
J. B. WAKEFIELD, "Receiver."

311 Examined 3.
C. H. B.
A. B. J. F.

No. 9.

Southern Minnesota Railroad.
Acts of July 4th and 13th, 1866.
Twenty Mile Limits.

List of lands in the district of lands subject to sale at the land office at Jackson, Minnesota, granted to said State by Acts of Congress approved July 4th and 13th, 1866, outside of the Ten and within the Twenty mile limits in lieu of the lands in the alternate sections, designated by odd numbers for Ten sections in width which the United States had sold or to which the right of pre-emption had not attached when the line or route of said road was definitely fixed.

312 North of base line and West of Fifth Principal Meridian.

Southern Minnesota.
Railroad List.

Twenty Mile Indemnity limits. Jackson Dist. Minn.

Parts of Section.	Section.	Township.	Range.	Acres.	Remarks.
N. W. ¼ & S. ½	35	101	28	480	

313 Examined
C. H. B.
A. B. J. F.

Department of the Interior,
General Land Office,

March 21st, 1871.

I, Willis Drummond, Commissioner of the General Land Office, do hereby certify that the foregoing on pages one to five inclusive is a true and correct list of the tracts of land selected by the agent of the State of Minnesota, outside of the Ten and within the Twenty mile limits, under the Act of Congress approved July 4th, 1866, entitled, "An act making an additional grant of lands to the State of Minnesota in alternate sections to aid in the construction of Railroads in said State," and the Act approved July 13th, 1866, entitled, "An Act relating to lands granted to the State of Minnesota to aid in constructing Railroads" the said selections being from the lands of the United States in the alternate sections designated by odd numbers outside of Ten and within Twenty miles of the line of Railroad running from Houston in the County of Houston, through the Counties Filmore, Mower, Freeborn and Faribault, to the Western boundary of the State; and being in lieu of the lands in the alternate sections designated by odd numbers within said Ten miles limits lying along the line of Ten miles of said road completed from the said town of Houston to Rushford, and which the United States had legally sold or granted, or to which the right of pre-emption or Homestead Entry had not legally attached prior to the period at which the right
314 of the State inured under said grant; and they are now submitted for the approval of the Secretary of the Interior in accordance with the requirements of said Acts of July 4th and 13th, 1866, subject to all their conditions, and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

In testimony whereof I have hereunto subscribed my name, and caused the seal of the General Land Office to be affixed,
[Seal] at the City of Washington on the day and year first herein above written.

WILLIS DRUMMOND, Commissioner.
Department of the Interior.

Washington City, D. C., March 25th, 1871.

Approved: Subject to the conditions and rights above mentioned.

C. DELANO,
Secretary.

315 Here follows a certain sectional map defining parts of Ranges 23 to 28 and Townships 100 to 107, purport-

ing to show the line of the Southern Minnesota Railroad through certain of said townships and ranges and defining the Ten and Twenty mile limits from said railroad.

316 Examined
C. H. B.
I. V. C.

5.

Affidavit.

Additional Homestead.
Act of March 3, 1879.

Land Office at .....
....., 188..

I, Michael Donovan, of Faribault Co., Minn. having filed my application No. ..... for an entry under the act of March 3, 1879 do solemnly swear that I am the head of a family and a citizen of the United States that I now reside on the tract applied for and have cultivated the same for 12 years last past as additional to my Final Entry No. 3568 for E. ½ S. W. 26—101—28—that I did not serve for a period of ninety days or more in the Army or Navy of the United States during the war of the rebellion and receive an honorable discharge therefrom; that said application No. ..... is made for my exclusive benefit; and that said entry is made for the purpose of actual settlement and cultivation as an addition to my homestead No. 3568, and not, directly or indirectly, for the use or benefit of any other person or persons whomsoever, and that I have not heretofore had the benefit of said act, except homestead No. 3568, that this affidavit is made before a Clerk of Court by reason of great distance from land office at Worthington, Minn.

MICHAEL DONOVAN.

Sworn to and subscribed this 26th day of June, 1883, before
[Seal]
H. J. NEAL,
Clerk District Court,
Faribault Co., Minn.

317 Examined
C. H. B.
I. V. C.

Application
No. .....

Homestead

Land Office at .....
....., 187..

I, Michael Donovan, of Faribault Co., Minn., do hereby apply to enter, under the provisions of the Act of Congress approved March 3d 1879, entitled "An Act to secure Homesteads to actual settlers on the public domain," the E. ½ N. W. ¼ of Section 35,

in Township 101 of Range 28, containing ..... acres, as additional to my Final Entry No. 3568 for the E. ½ S. W. ¼ of Sec. 26, 101, 28.

MICHAEL DONOVAN.

Land Office at .....
....., 187...

I, ..., Register of the Land Office, do hereby certify that the above application is for Surveyed Lands of the class which the applicant is legally entitled to enter under the Homestead Act of May 20, 1862, and that there is no prior, valid, adverse right to the same.

MONS GRINAGER,
Register.

318 No.

Homestead Application.
Michael Donovan.
Worthington, Minnesota.

E. ½ N. W. June 28, 1883.
Section 35, Township 101, Range 28.

This application was made and fees tendered and rejected for the reason that the land applied for was certified to the S. M. R. R. Co. Mar. 25, 1871.

Thirty days allowed for appeal.

MONS GRINAGER,
Register.

C. H. SMITH,
Receiver.

319 United States of America,
District of Minnesota—ss.

I, H. Harcourt Horn, being the duly appointed Special Examiner to take and return the testimony in the cause to which this certificate is attached, do hereby certify, that, pursuant to the consent, agreement and stipulation of the solicitors for the respective parties, I did appear at the several times and places stated in the foregoing record, and was attended by the solicitors for the respective parties at such times and places; that I then and there, and at each of the said times and places named did take down in shorthand, verbatim, in full, and correctly, the testimony and all the testimony of all the witnesses produced before me for examination, on either side, and all the proceedings therein. That at all such times and places, each of the several witnesses, before testifying, was by me duly cautioned and sworn, to tell the truth, the whole truth and nothing

but the truth, relative to the matters in controversy in this cause.

I further certify, that the typewritten record to which this certificate is attached, contains a full, correct and complete record or transcript of the shorthand notes, and of all of the same, so by me taken as aforesaid; further, that the Exhibits filed and returned with this record, are all of the original exhibits produced and received on the several hearings of this cause; save where copies of the same are filed; and that where such copies are filed, it was expressly agreed and stipulated between the solicitors for the respective parties, that such copies should be substituted on the record for the originals thereof, as fully and completely as if the originals were filed; and further, that said copies, both in the record and on file, are true, full, correct and compared copies of such originals.

I further certify, that it was expressly agreed and stipulated by and between the respective solicitors, that the reading and signing the depositions by the respective witnesses, should be and was waived, and that such depositions were to have and should have the same force and effect as if the same had been duly read and signed by the respective witnesses.

Witness my hand this 13th day of January A. D. 1902.

H. HARCOURT HORN,
Special Examiner.

320 Circuit Court of the United States for the District of Minnesota, Third Division.

The United States of America, Complainant.

vs.

Chicago, Milwaukee & St. Paul Railway Company, The Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thompson, O. C. Erichsrud, Anna Erichsrud, Addie J. Erichsrud, Mabelle H. Anderson nee Erichsrud, Julia P. Remington nee Erichsrud, and Louis K. Woodwick, Defendants.

It is Hereby Stipulated and Agreed that typewritten copies of the following documents from the record in the above entitled action shall constitute the record in said action for the use of the Court upon the hearing of the same, subject, however, to all exceptions taken to the testimony or any part thereof and to the exhibits offered in evidence:

1. The original bill and amendments thereto.
2. The supplemental bill.
3. The answer of the defendant Railway Companies and the Replications thereto.
4. The answer of the defendant Donovan.

5. The answer of the defendants Erichsruds and Woodwick and Replications thereto.

6. The stipulated Facts and exhibits therein referred to.

7. The appointment of H. Harcourt Horn as Special Examiner to take testimony in said action.

8. Testimony taken on the part of the plaintiff of Adam H. Bullis, Michael Donovan, Bert Donovan, George D. Moore, Peter L. Weldon, John Carr, Henry Schilling, and on the part of the defendants the testimony of Frederick P. Brown, Annie Erichsrud, Mabelle Anderson, Wayne Silliman, Louis K. Woodwick, William E. C. Ross, Peter Hagan, and the plaintiff's and defendants' exhibits in the case.

M. D. PURDY & J. M. GILMAN,
Solicitors for Complainant.
BURTON HANSON, & W. H. NORRIS,
Solicitors for Defendant Ry Cos.
ANDREW C. DUNN,
Sol'r for other defts served except Donovan.

Indorsed: Stipulation as to contents of record. Filed Feby. 3rd, 1902. Henry D. Lang, Clerk. By Louise B. Trott, Deputy.

321 United States of America.
District of Minnesota.
Third Division.

I, Henry D. Lang, Clerk of the Circuit Court of the United States for the District of Minnesota, do hereby certify that I have carefully compared the foregoing paper writings, viz: Original bill of complaint and amendments thereto, Supplemental Bill, Answer of Railway Companies, and replications thereto, Answer of Donovan, Answer of Erichsruds and Woodwick, and Replications thereto: Stipulated Facts and exhibits therein referred to, Appointment of H. H. Horn, Special Examiner, Testimony of witnesses for complainant and defendant and exhibits thereto attached and stipulation as to contents of record, which are in my custody as such Clerk and that such copies are true copies of such originals and of the whole thereof in the cause therein named.

Witness my hand as clerk and the seal of said Court. Done at my office in St. Paul, this 7th day of February A. D. 1902.

(Seal of Court.) HENRY D. LANG, Clerk.

Indorsed: Complainants & Defendants Record. Filed February 7th 1902. Henry D. Lang, Clerk.

322 Circuit Court of the United States, District of Minnesota, Third Division.

United States of America
vs.
Chicago, Milwaukee & St. Paul Ry. Co., Michael Donovan et al.

Praecipe for Placing Cause on June, A. D. 1901, Calendar.

To the Clerk of Above Named Court:

Please place the above named case on the Calendar for the June, A. D. 1901 Term.

R. G. EVANS and
J. M. GILMAN,
Solicitors for Complainants.

Indorsed: Filed June 14th, 1901. Henry D. Lang, Clerk.

323 United States Circuit Court, District of Minnesota,

Chancery Rule Register.

1901 June 14.

United States of America
No. 774. vs. C. Equity.
Chicago, Milwaukee & St. Paul Railway Company, Michael Donovan, et al.

Pursuant to a praecipe this day filed, signed by the solicitors for the complainant, it is ordered that this cause, be and the same hereby is set down for hearing on the first day of the June, A. D. 1901 Term of said Court or as soon thereafter as counsel can be heard.

United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1901, Jany. 6th, 1902.

Monday Morning Court opened pursuant to adjournment.

Present, Hon. William Lochren, Judge. Hon. Milton D. Purdy, U. S. District Attorney. Hon. William H. Grimshaw, U. S. Marshal, By S. J. Picha, Deputy. Henry D. Lang, Clerk.

United States of America
No. 774. vs. C. Equity.
Chicago, Milwaukee & St. Paul Railway Company, Michael Donovan, et al.

Ordered that this cause be and the same hereby is continued until the next regular term of this Court at St. Paul, Minnesota.

* * * * * A true record. Attest: Henry D. Lang, Clerk.

324 United States Circuit Court for the District of Minnesota.

Term Minutes, January Term, A. D. 1902, Feby. 10th, 1902.

Monday morning. Court opened pursuant to adjournment.

Present, Hon. William Lochren, Judge. Hon. Milton D. Purdy, U. S. District Attorney. Hon. William H. Grimshaw, U. S. Marshal. Henry D. Lang, Clerk.

United States of America
No. 774. vs. C. Equity.
Chicago, Milwaukee & St. Paul Railway Company, Michael Donovan, et al.

This cause being regularly called for hearing in its order on the calendar, the parties appear by their respective solicitors, M. D. Purdy, Esq., appearing on behalf of the complainant and F. W. Root, Esq., appearing on behalf of the defendants.

Whereupon, upon agreement and consent of the solicitors for the respective parties, it is by the Court ordered that this cause be and the same hereby is set down for hearing and argument at St. Paul, Minnesota, on Thursday the 27th day of February, A. D. 1902, at ten o'clock in the forenoon.

* * * * * A true record. Attest: Henry D. Lang, Clerk.

325 United States Circuit Court for the District of Minnesota.

Term Minutes, January Term, A. D. 1902, Feby. 27th, 1902.

Thursday morning. Court opened pursuant to adjournment.

Present, Hon. William Lochren, Judge. Hon. Milton D. Purdy, U. S. District Attorney. By Fred. N. Dickson, Assistant. Hon. William H. Grimshaw, U. S. Marshal. Henry D. Lang, Clerk.

United States of America
No. 774. vs. C. Equity.
Chicago, Milwaukee & St. Paul Railway Company, Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thomson, O. C. Erichsrud, Addie J. Erichsrud, Mabelle H. Anderson, nee Erichsrud, Julia P. Remington, nee Erichsrud, and Louis K. Woodwick.

This cause being regularly called for trial in its order on the calendar the parties appear by their respective solicitors, J. M. Gilman, Esq., Special Assistant U. S. Attorney, and Fred

N. Dickson, Esq., Assistant U. S. District Attorney, appearing on behalf of the Complainant, and Andrew C. Dunn, Esq., appearing on behalf of the defendants Erichsrud and Woodwick and W. H. Norris ,Esq., appearing on behalf of the Chicago, Milwaukee & St. Paul Railway Company, and Southern Minnesota Railway Company, and the said cause coming on for final hearing upon the pleadings, final proofs and records.

J. M. Gilman, Esq., opens the cause to the Court and argues the same on behalf of the complainant.

And here the Court takes a recess until 1 o'clock P. M.

The Court resumes proceedings at 1 o'clock P. M.

Andrew C. Dunn, Esq., opens the cause to the Court and argues the same on behalf of the defendants Erichsruds and Woodwick.

W. H. Norris, Esq., argues said cause on behalf of the defendants Chicago, Milwaukee & St. Paul Railway Company, and Southern Minnesota Railway Company.

326 J. M. Gilman, Esq., replies and argues further on behalf of the Complainant.

After hearing the arguments and statements of the solicitors for the respective parties and being fully advised in the premises, after due consideration, the court renders an oral decision in favor of the defendants and against the complainants and directs the solicitors for the defendants to prepare a decree accordingly to be signed, filed and entered.

* * * * * A true record. Attest: Henry D. Lang, Clerk.

327 Circuit Court of the United States, District of Minnesota, Third Division.

The United States of America, Complainant,
vs. In Equity.
The Chicago, Milwaukee & St. Paul Railway Company, The Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thomson, Louis K. Woodwick, and the heirs of O. C. Erichsrud, deceased, Defendants.

This cause came on for hearing before Hon. William Lochren, Judge U. S. District Court for the District of Minnesota, at the Federal Building, St. Paul, Minnesota, on the 27th day of February, John M. Gilman, Esq., of Special Counsel and M. D. Purdy, Esq., U. S. District Attorney appeared for the complainant; W. H. Norris, Esq., appeared for the Railway Companies, and Andrew C. Dunn, Esq., for all the defendants ex-

cept Michael Donovan; and the Court after full argument of the cause by the respective counsel, rendered the following decision, orally.

This is a suit brought by the United States against several railway companies, Michael Donovan, the Erichsrud heirs, and Louis K. Woodwick, to recover a tract of land which is described in the pleadings as the East half of the Northwest quarter of Section 35, Township 101, North, Range 28 West, upon the ground that the land was improperly certified to the State of Minnesota and transferred by the State to the railway company, as a part of the indemnity lands of the land grant of July 4, 1866, made in aid of what afterwards became the Southern Minnesota Railroad, passing through some of the southern counties of the State of Minnesota; for the reason that prior to the passage of the Land Grant Act of July 4, 1866, a homestead claim was filed upon said land by one Luman Barkley, on June 21, 1866, which had not been cancelled and by the terms of the land grant the land was excepted from the grant.

328 It appears from the testimony, that afterwards, in 1867, Barkley having left the State and gone to Canada, and by letter stated his intention of abandoning this homestead, Michael Donovan seeking to make a homestead upon the public land, selected this same land, and applied at the local land office to enter the same, and was informed that he could not do so until after the validity of the previous entry by Barkley was determined; that he gave notice of contest at that time, and in August, 1867, the matter of the contest came on before the local land officers, and it was determined that the entry of Barkley had been abandoned and that it should be cancelled; that at that time Mr. Donovan sought to make an entry upon this land, but such entry was refused, for the reason that the determination at the land office would have to be reported to and upon by the General Land Office, and until that was done, the land remained as appropriated or segregated from the public domain, by reason of Barkley's entry, and that no entry could be made upon it, until the cancellation of that entry had been approved by the General Land Office, and its determination had been notified to the Local land office, and noted on its records.

It appears that Donovan thereupon left an application in blank, or without date, rather, but describing this land, with the register of the local land office, that his application might be filed when the notification came back that Berkley's entry had been vacated and set aside; and he paid the amount of money which was required in making such entries, the fees of

the office, to the amount of $15 as his testimony tends to show for that purpose; a sufficient amount, I apprehend.

It is claimed here by counsel for the complainant that thereby, upon the entry of Barkley being cancelled, this paper being in the hands of the officers of the local land office, that it was sufficient to operate as an entry on the part of Donovan, of this land as a homestead; that this undated application of Donovan left with the register of the land office would
329 become effective upon his receiving notice from Washington that the proofs had been received, and the entry of Barkley was vacated or cancelled.

Mr. Gillman: It would become effective when he applied to complete it by filling in the date, and offering to make the entry.

The Court: Is there any evidence that he ever did that

Mr. Gilman: His own testimony.

The Court: At what time?

Mr. Gilman: On the 6th of June, when he went there, and was told then that the land could not be entered by him.

The Court: That was on the 6th of June, 1868?

Mr. Gilman: Yes, sir.

The Court: I apprehend that the leaving of that undated paper, with directions to the register of the land office to file it upon being notified of the order from the General Land office approving the vacation of the previous entry, would not be an entry by Donovan, under the homestead law. That when he attempted to make that entry by leaving that paper there, the land was not subject to entry, for the reason that the previous entry was not cancelled, and under the rules of the land office, could not be subject to entry by any other person until the previous entry had been cancelled at Washington, and notice thereof had been received back at the local land office, and noted upon its records. Then the land would be open for entry by the first applicant that came up there; but the rules of the land Department would not admit of an application of this kind being left there ahead of the time, to be filed when the time came about.

I think that question was decided by the Circuit Court of Appeals of this Circuit, in the case of Germania Iron Company v. James, 89 Fed. 811. This was a case where there had been an attempt by a person to locate a homestead upon a tract of mineral land upon the Messaba Range, upon getting private notice by telegraph that a previous entry had been cancelled by the Secretary of the Interior. The local land officers
330 refused to receive the entry that was offered, they not having received notice from the General Land Office of

its actions, and they did not receive notice thereof until two or three days later, when they permitted entry of the land to be made by another person who happened to be the first person that came there after notice had been received by them and entered upon their records. The Secretary of the Interior held, upon a contest, that the one who first applied, upon receiving private notice by telegraph, was the earliest, and allowed his entry. The Circuit Court of Appeals reversed that decision of the Secretary, upon the ground that it was contrary to the established rule which was in force in the Land Department, to the effect that an entry remains good, and segregates the land from the public domain, not only until it is cancelled, but notification of that cancellation is received back by the local, land office, and entered upon its records.

Under that decision, I am inclined to think that Mr. Donovan's attempts to enter this tract as a homestead, by leaving a blank application with the register of the land office, at the time he did so, was futile.

It appears that he did apply to enter this land as a homestead in the following June, and after the action of the General Land Office directing the vacation of the previous entry had been noted on the records of the local land office. But, prior to that time there had been an order issued from the Secretary of the Interior withdrawing all land in odd sections, within the indemnity limits, as well as the place limits of this land grant, from public sale or from entry, until the rights of the railroad company were settled; until the railroad company had made its selections, and its rights were determined.

Now it is true that under the decision in the Dunmeyer case 113 U. S. 629, this particular eighty was accepted (ex) from the land grant, there being a valid entry existing at the time of the passage of the land grant Act; and probably, at
331 the present time, or at any time after the decision in the Dunmeyer case, it would be held that an order withdrawing the land in odd sections from sale or entry within those limits, would not apply to a tract in this condition, even after that previous entry had been abandoned; but, that having been excepted from the grant, it could never fall within it. But such was not the ruling of the General Land Office at the time when Mr. Donovan attempted to enter this tract in June, 1868. The holding then was, that although there was a valid pre-emption or homestead entry existing upon the land, still, if that was afterwards cancelled for any reason, or abandoned, then, upon such cancellation or abandonment,

the land would fall into the grant to the State of Minnesota in aid of the railroad, as it would have fallen had there been no entry existing at the time of the passage of the act, or at the time of the location of the road. And therefore, it was the understanding of the Land Department, including the local land officers, that a withdrawal of lands within these limits, so as to prevent new disputes until the railroad selections were made, would include lands of this kind, where there had been an entry existing at the time of the grant, which had been cancelled subsequently. That was the reason, evidently, which caused the register of the land office to refuse the offer of Mr. Donovan to make an entry which included this eighty in section 35, but advised him to make such entry to include a tract of land in section 26 alone, and that he made such entry according to that advice.

I do not think there is any doubt about the right of the United States to recover lands which have been mistakenly certified as belonging to a railroad Company's grant, and covered by it, when in fact, they are not covered by it. I do not think there is any doubt that this case comes under the Act of March 3, 1887; and I do not think that the fact that there was no notice served upon the Southern Minnesota Railroad Company, which was the corporation in whose interest this grant was originally made, will defeat this action.

332 It appears from the statement of counsel, in connection with the testimony, that that company is virtually out of existence, and that all its property and franchises passed by foreclosure and subsequent deed to the Southern Minnesota Railway Company, which, if it has any existence at all is probably existing as some ancillary company to the Chicago, Milwaukee & St. Paul Railway Company, and is virtually owned by that Company.

The right of the United States to recover its land cannot be defeated because of any of these reasons; but the principal question in the case, after all, is the validity of the title of the defendant Woodwick. It being admitted that these lands were conveyed by the Land Department by proper certification, to the State, (which had the effect of a conveyance by patent), and by the State to the railroad company, I think there is no doubt but that under the situation shown, such a conveyance passed the legal title. It is not void, but it may be voidable. A purchaser or a grantee may be held in a court of equity to hold the title as a trustee for some one who has a stronger equity. But the land when so certified was within the control of the Land Department, and its certification having the effect of a patent, was sufficient to convey the legal

title to the land to the State, for the purpose and for the uses of the grant. And the title having passed by the deed of the State to the railroad Company, I think there is no doubt but that the legal title went to the railroad company.

The serious question in this case is whether the present holder of the title from the railroad company is a bona fide purchaser, or whether any of his grantors were such. It appears from the testimony, as I understand it, that Woodwick paid about two thousand dollars for the land, and the only thing that is relied upon to question his bona fides is the fact that at some time Mr. Donovan has been in possession of this particular eighty; had cultivated certain portions of it, and has made certain claims to it. I think if the present holder of the title had made such inquiries as he could as to the rights that Mr. Donovan had in the premises, that he would not have found anything which would have
333 caused him to consider that Donovan had any valid claim to the land. He would have ascertained his legal contest with Thomson the proper grantee of the railroad Company, and that Thomson was successful in that contest, and adjudged to be the owner of the land; and, under the circumstances, as far as Mr. Donovan was concerned, I am inclined to think that it would be unreasonable to hold that the present holder should not give full credit to that decision, and after that time regard Mr. Donovan as having no valid claim to the land.

I think therefore, that the present holder is a bona fide holder, and that the bill should be dismissed. Ordered accordingly.

Dated Feby. 27, 1902.

Indorsed: Opinion, dismissing bill. Filed March 3rd, 1902. Henry D. Lang, Clerk.

334 United States Circuit Court for the District of Minnesota.

Term Minutes, January Term, A. D. 1902, March 10th, 1902.

Monday morning. Court opened pursuant to adjournment.

Present, Hon. William Lochren, Judge. Hon. Milton D. Purdy, U. S. District Attorney. Hon. William H. Grimshaw, U. S. Marshal. Henry D. Lang, Clerk.

The United States of America
No. 774. vs. C. Equity.
Chicago, Milwaukee & St. Paul Railway Company, the Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thomson, O. C. Erichsrud, Anna Erichsrud, Addie J. Erichsrud, Mabelle H. Anderson, nee Erichsrud, Julia P. Remington, nee Erichsrud, and Louis K. Woodwick.

This cause came on to be heard at the January Term of this Court, 1902, upon the pleadings and Final Proofs therein, and it was argued by counsel, and thereupon, upon consideration thereof, it is by the Court Ordered, Adjudged and Decreed, that the Complainant's Bill herein be, and the same is hereby dismissed on the merits.

Dated this 1st day of March, 1902.

WM. LOCHREN, Judge.

* * * * * A true record. Attest: Henry D. Lang, Clerk.

335 Circuit Court of the United States, for the District of Minnesota, Third Division.

The United States of America, Complainant,
vs.
Chicago, Milwaukee & St. Paul Railway Company, The Southern Minnesota Railway Company, Anna Erichsrud, Addie J. Erichsrud, Mabelle H. Anderson, nee Erichsrud, Julia P. Remington, nee Erichsrud, and Louis K. Woodwick, Defendants.

Now comes the United States of America, complainant in the above entitled action, by Milton D. Purdy, U. S. District Attorney for Minnesota, and J. M. Gilman, Assistant Attorney in said action for plaintiff, and conceiving itself aggrieved by the decree entered in the above entitled cause on the 10th day of March, 1902, dismissing complainant's bill, doth hereby appeal, from said order to the United States Circuit Court of Appeals for the Eighth Circuit, and said complainant prays that its said appeal may be allowed and that a transcript of

the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

MILTON D. PURDY,
U. S. District Attorney for Minnesota.

J. M. GILMAN,
Assistant Attorney for Plaintiff in Said Action.

Filed March 15th, 1902. Henry D. Lang, Clerk.

336 And now, to wit: on March 15th, 1902, it is ordered that the appeal in the foregoing entitled cause be allowed as prayed for.

WM. LOCHREN, Judge.

Filed March 15th, 1902. Henry D. Lang, Clerk.

Assignment of Errors of appellant on appeal of the foregoing entitled action, to the U. S. Circuit Court of Appeals, Eighth Circuit.

And now in the foregoing entitled cause, and at the time of the filing therein of the foregoing and attached petition for appeal, comes the said appellant, the United States of America, and says that in the records and proceedings in the above entitled cause there is manifest error, in this, towit: That the court erred as follows:

First: The court erred in holding that lands in the indemnity limits of a railroad grant sustained a like relation to the grant as lands in the place or granted limits, and in such ruling involved the following errors:

(a) That lands could be withdrawn from market before the location of the road, notwithstanding the provision in Section 5 of said granting act; "that as soon as the Governor of said State shall file or cause to be filed with the Secretary of the Interior, maps designating the route of said road, then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act."

(b) That the Secretary could withdraw land from market which was subject to a homestead entry claim at the date of the passage of the act, and that such homestead entry did not except the land from a general withdrawal.

(c) That the withdrawal of lands in the indemnity limits from market by the Secretary of the Interior December
337 10th, 1866, or at any other time operated upon the tract of land in question, as the homestead entry of Barkley did not except it from the operation of the withdrawal.

(d) That a homestead or pre-emption entry in force at the time of the passage of a granting act, upon place or granted lands, does not except the land from the grant for all future time.

(e) That lands within the indemnity limits of a grant if subject to a homestead or pre-emption entry prior to the selection of the land by the company, or prior to its withdrawal from market, if afterwards cancelled, the land then becomes subject to selection by the company, but not to a homestead or pre-emption claim by the first legal applicant therefor.

(f) In not noticing the first, second, sixth, ninth, tenth, eleventh, twelfth and fourteenth stipulations of fact agreed to by counsel.

Second. The court erred in not finding as a fact from the evidence that the application of Donovan to enter the land in question secured to him the same right as though the application had been allowed, which fact is well established by many decisions of the highest court.

Third. The court erred in not finding as a fact from the evidence that Donovan complied with the law so as to entitle him to a certificate and patent for the land in question, and thereby acquired a vested interest in the land which could not be taken from him by any act of Congress without his consent.

Fourth. The court erred in holding that the defendant Woodwick became a bona fide purchaser of the land in question under the act of March 3rd, 1887 and cut out Donovan of his acquired vested right.

Fifth. The court erred in not holding that the certification of the land to the State was absolutely void and conferred no title to the State or to its grantees.

338 Sixth. The court erred in not holding under the decision in the case of Van Wyck against Knevals, 106 U. S. 360, that an action can be maintained by the United States to remove a cloud from the title to land so as to enable the Government to convey a good title to the party entitled thereto.

Seventh. The court erred in holding that the action and judgment in the suit between Donovan and Thomson can be used to prejudice Donovan's title or to uphold the title of Woodwick to the land in question.

Eighth. The court erred in not finding and holding that the defendant Donovan had a clear right to a good title to the

land, which could and should be conveyed to him by the United States.

Ninth. The court erred in ordering complainant's bill to be dismissed. Wherefore the complainant prays that the said decree may be in all things reversed; and that complainant may have a decree for the relief prayed in its amended bill of complaint.

MILTON D. PURDY,
U. S. District Attorney for Minnesota.

J. M. GILMAN,
Assistant Attorney in Said Action.

Indorsed: Petition for and Order Allowing Appeal. Assignment of Errors and Prayer for Reversal. Filed March 15th, 1902. Henry D. Lang, Clerk.

339 Circuit Court of the United States, for the District of Minnesota, Third Division.

The United States of America, Complainant,
vs.
Chicago, Milwaukee & St. Paul Railway Company, The Southern Minnesota Railway Company, Anna Erichsrud, Addie J. Erichsrud, Mabelle H. Anderson, nee Erichsrud, Julia P. Remington, nee Erichsrud, and Louis K. Woodwick, Defendants.

Citation.

The United States of America—ss.

To the following defendants in the above entitled action: Chicago, Milwaukee & St. Paul Railway Company, The Southern Minnesota Railway Company, Anna Erichsrud, Addie J. Erichsrud, Mabelle H. Anderson, nee Erichsrud, Julia P. Remington, nee Erichsrud, and Louis K. Woodwick,

You and each of you are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Eight Circuit, to be holden at the City of St. Louis, Mo., sixty days from and after the date hereof, pursuant to an appeal taken out of and allowed by the Circuit Court of the United States of the District of Minnesota, Third Division, wherein the United States of America is appellant and the defendants Chicago, Milwaukee & St. Paul Railway Company, the Southern Minnesota Railway Company, Anna Erichsrud, Addie J. Erichsrud, Mabelle H. Anderson, nee Erichsrud, Julia P. Remington, nee Erichsrud, and Louis K. Woodwick, are respondents, to show cause, if any there be, why the decree in the said appeal mentioned should not be set aside and cor-

rected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Lochren, acting Circuit Judge of the United States Circuit Court of the District of Minnesota, this 15th day of March, A. D. 1902.

WM. LOCHREN,
Acting Circuit Judge.

340 United States Circuit Court, District of Minnesota, 3d Division. United States of America vs. Chicago, Milwaukee & St. Paul Railway Company, & Michael Donovan et al., Defendants. Citation. Due service of the within citation is hereby admitted this 19 day of March, A. D. 1902, at Minneapolis, Minnesota. Andrew C. Dunn, Attorney for Defts. Anna Erichsrud, Addie J. Erichsrud, Mabel H. Anderson, nee Erichsrud, Julia P. Remington, nee Erichsrud, & Louis K. Woodwick. Due service of within Citation this 17th day of March, 1902, is hereby admitted. Burton Hanson & W. H. Norris, Solicitors for Deft. Ry. Cos.

341 United States of America.

Circuit Court of the United States, District of Minnesota, Third Division.

I, Henry D. Lang, Clerk of said Circuit Court, do hereby certify and return to the Honorable, the United States Circuit of Appeals for the Eighth Circuit, that the foregoing, consisting of 340 pages, numbered consecutively from 1 to 340 inclusive, is a true and complete transcript of the Record for Hearing in Equity, proceedings upon the hearing of said cause, Opinion, Final Decree, and the records and proceedings upon the appeal in said cause and of the whole thereof, as appears from the original records and files of said Court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

Seal
U. S. Circuit Court,
Dist of Minnesota,
Third Division.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court, at Saint Paul in the District of Minnesota, this 21st day of March, A. D. 1902.

HENRY D. LANG, Clerk.

Filed Mar. 24, 1902. John D. Jordan, Clerk.

211 *Appearance of Mr. Milton D. Purdy for appellant.*

And on the twenty-eighth day of March, A. D. 1902, the appearance of Mr. Milton D. Purdy as counsel for appellant was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to-wit:

United States circuit court of appeals, eighth circuit.

UNITED STATES OF AMERICA, APPELLANT, *vs.* THE CHICAGO, MILWAUKEE AND ST. PAUL Railway Company et al.	No. 1740.

The clerk will enter my appearance as counsel for the appellant.

MILTON D. PURDY,
United States Attorney.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1740. United States of America, appellant, vs. Chicago, Milwaukee and St. Paul Railway Co. et al. Appearance. Filed Mar. 28, 1902. John D. Jordan, clerk. Milton D. Purdy, counsel for appellant.

Appearance of Mr. John M. Gilman for appellant.

And on the twenty-eighth day of March, A. D. 1902, the appearance of Mr. John M. Gilman as counsel for appellant was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit.

UNITED STATES OF AMERICA, APPELLANT, *vs.* THE CHICAGO, MILWAUKEE AND ST. PAUL Railway Company et al.	No. 1740.

The clerk will enter my appearance as counsel for the appellant.

JOHN M. GILMAN.

212 (Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1740. United States of America, appellant, vs. The Chicago, Milwaukee and St. Paul Railway Co. et al. Appearance. Filed Mar. 28, 1902. John D. Jordan, clerk. John M. Gilman, counsel for appellant.

Appearance of Mr. Burton Hanson for appellee railway company.

And on the first day of April, A. D. 1902, the appearance of Mr. Burton Hanson as counsel for appellee railway company, was filed in the

clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILway Company et al. } No. 1740.

The clerk will enter my appearance as counsel for the appellee Ry. Co.

BURTON HANSON.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1740. The United States of America, appellant, vs. The Chicago, Milwaukee and St. Paul Railway Co. et al. Appearance. Filed Apr. 1, 1902. John D. Jordan, clerk. Burton Hanson, counsel for appellees.

Appearance of Mr. Andrew C. Dunn for appellees.

And on the fourth day of April, A. D. 1902, the appearance of Mr. Andrew C. Dunn as counsel for the appellees was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit.

213 THE UNITED STATES OF AMERICA, APPELLANT,
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILway Company et al. } No. 1740.

The clerk will enter my appearance as counsel for the appellees, Anna Erichsrud, Addie J. Erichsrud, Mabel H. Anderson, nee Erichsrud, Julia P. Remington, nee Erichsrud, and Louis K. Woodwick.

ANDREW C. DUNN,
Residing at Winnebago City, Minnesota.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1740. The United States of America, appellant, vs. The Chicago, Milwaukee and St. Paul Railway Co. et al. Appearance. Filed Apr. 4, 1902. John D. Jordan, clerk. Andrew C. Dunn, counsel for appellees.

Appearance of Mr. W. H. Norris for appellees, railway companies.

And on the twelfth day of April, A. D. 1902, the appearance of Mr. W. H. Norris as counsel for the appellees, railway companies, was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to-wit:

United States circuit court of appeals, eighth circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY Company et al. } No. 1740.

The clerk will enter my appearance as counsel for the appellees, railway companies.

W. H. NORRIS,
Minneapolis, Minn.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1740. The United States of America, appellant, vs. The Chicago, Milwaukee and St. Paul Railway Co. et al. Appearance. Filed Apr. 12,
214 1902, John D. Jordan, clerk. W. H. Norris, Minneapolis, Minn., counsel for appellees.

Argument commenced.

And on the fourteenth day of May, A. D. 1902, in the record of the proceedings of said circuit court of appeals is an entry in said cause, in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit. May term, 1902.

WEDNESDAY, *May 14, 1902.*

THE UNITED STATES OF AMERICA, appellant,
vs.
THE CHICAGO, MILWAUKEE AND ST. Paul Railway Company et al. } No. 1740. Appeal from the circuit court of the United States for the district of Minnesota.

This cause having been called for hearing in its regular order, argument was commenced by Mr. John M. Gilman for appellant, and continued by Mr. Andrew C. Dunn, on behalf of the appellees, Erichsrud et al., and the hour of adjournment having arrived, further argument is postponed until to-morrow.

Order of submission.

And on the fifteenth day of May, A. D. 1902, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause, in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit. May term, 1902.

THURSDAY, *May 15, 1902.*

THE UNITED STATES OF AMERICA, appellant,
vs.
CHICAGO, MILWAUKEE AND ST. PAUL Railway Company et al. } No. 1740. Appeal from the circuit court of the United States for the district of Minnesota.

215 This cause having been called for further hearing, argument was continued by Mr. Andrew C. Dunn for the appellees, Erichsrud et al., and concluded by Mr. John M. Gilman for appellant. Mr.

W. H. Norris submits a brief in behalf of the railway companies, appellees.

Thereupon, this cause was submitted to the court on the transcript of record from said circuit court and the briefs of counsel filed herein.

Opinion.

And on the sixteenth day of June, A. D. 1902, an opinion of said circuit court of appeals was filed in said cause, in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit. May term, A. D. 1902.

216 THE UNITED STATES OF AMERICA, appellant, *vs.* CHICAGO, MILWAUKEE & SAINT PAUL Railway Company et al., appellees. } No. 1740. Appeal from the circuit court of the United States for the district of Minnesota.

Mr. John M. Gilman (Mr. Milton D. Purdy was with him on the brief) for appellant.

Mr. Burton Hanson and Mr. W. H. Norris filed brief for railway companies.

Mr. Andrew C. Dunn for appellees Erichsrud, Anderson, Remington, and Woodwick.

Before Sanborn and Thayer, circuit judges, and Carland, district judge.

On March 6, 1893, the United States filed their bill of complaint in the above action against the Chicago, Milwaukee & St. Paul Railway Company, the Southern Minnesota Railway Co., Michael Donovan, Thomas S. Thompson, and O. C. Erichsrud. Service of subpœna was made upon the railway companies and Donovan, and on August 11, 1894, said companies answered the bill. Donovan did not answer the bill till March 6, 1901, and then by his answer confessed the same and prayed that the relief asked for might be granted. On March 4, 1901, a supplemental bill was filed by the United States in said action wherein it was stated that no service had ever been made upon Thompson or Erichsrud, and that no testimony had ever been taken in the cause; that O. C. Erichsrud had departed this life since the commencement of the action, leaving surviving him, Anna Erichsrud, his widow, Addie J. Erichsrud, Mabelle Erichsrud, and Julia P. Erichsrud, his children and only heirs at law, and that on June 24, 1899, said heirs had joined in a deed of the land in question to Louis K. Woodwick. Process was prayed against these last-named defendants, and on May 2, 1901, Anna Erichsrud, Addie J. Erichsrud, Mabelle H. Anderson (formerly Erichsrud), Julia P. Remington (formerly Erichsrud), and Louis K. Woodwick answered the bill and supplemental bill.

This action was commenced by the United States for the purpose of having the east half of the northwest quarter of section thirty-five, township one hundred and one, range twenty-eight, 5th P. M., Min-

nesota, restored to the United States upon the ground that the land
217 had been improperly certified to the State of Minnesota as a part of the indemnity lands of the land grant of July 4, 1866, made in aid of the Southern Minnesota Railroad Company for the reason that prior to the passage of the land-grant act of July 6, 1866, an homestead claim had been filed upon said land by one Luman Barkley. The material facts, as shown by the pleadings and proofs, are as follows:

The land is within the indemnity limits of the act of July 4, 1866 (14 Stat., 87). The withdrawal of lands along that portion of the Southern Minnesota Railroad extension opposite said land was ordered August 23, 1866, and the order received by the district land office September 10th following. November 29, 1870, the Southern Minnesota Railroad Company selected the tract of land in controversy in lieu of land lost in the granted limits of the act of July 4, 1866, and the Land Department certified said land to the State of Minnesota for the benefit of said railroad company March 25, 1871. The State of Minnesota conveyed said land to said railroad company August 8, 1871. The land was sold under a mortgage foreclosure to A. P. Mann and H. H. Camman in February, 1877. It was conveyed by Mann and Camman to the Southern Minnesota Railway Company March 3, 1877. It was conveyed by said railroad company to O. C. Erichsrud March 20, 1888. November 6, 1898, it was decreed by the probate court of Faribault County, Minnesota, to Anna Erichsrud, Addie J. Erichsrud, Mabelle H. Anderson, and Julia P. Remington, as heirs at law of O. C. Erichsrud, deceased. May 24, 1899, these heirs at law conveyed the same to the defendant, Louis K. Woodwick, for the sum of two thousand dollars, cash. On June 21, 1866, Luman Barkley, a person duly qualified to acquire lands under the homestead law of the United States, duly made entry as an homestead of the land in controversy, together with an adjoining tract of eighty acres in section 26. January 14, 1868, the entry of Barkley was cancelled on account of the abandonment of the land by Barkley. June 6, 1868, Michael Donovan entered as an homestead the eighty acre tract in section 26, and subsequently received patent for the same. It was in pursuance of a contest initiated by Michael Donovan in 1867 that Barkley's entry was cancelled. When Michael Donovan was notified by the local land office that Barkley's entry was cancelled, he, about June 6, 1868, applied to enter the tracts of land of eighty acres each in sections 35 and 26, respectively. Donovan was allowed to enter the tract in 26, but was informed by the local office that the tract in section 35, the land in controversy, had been withdrawn from sale for the reason that it was within the indemnity limit of the land grant contained in the act of July 4, 1866. Donovan made no written application in June, 1868, to enter the tract in section 35. When Donovan initiated the contest against Barkley in 1867, he signed a paper which was called an application to enter the land in controversy. This paper was in blank as to date and it was undoubtedly to be properly filled out when Barkley's entry should be cancelled, but when the entry was cancelled this paper was destroyed, as it was claimed the land was not subject to entry for the reasons herein stated.

Donovan used the land in controversy in connection with his homestead in section 26 till 1885, when one Thompson went into possession

of the same as assignee of a contract made by the Southern Minnesota Railway Co., and under and in pursuance of which title to the land was finally conveyed to Erichsrud. Donovan has not been in possession of the land since 1885.

218 Carland, district judge, after stating the foregoing facts, delivered the opinion of the court.

The claim of the United States is this: At the time of the withdrawal of indemnity lands along the line of the Southern Minnesota Railway Company opposite the land in question, to wit, on September 10, 1866, there was a valid homestead filing on the land in question made by Luman Barkley on June 21, 1866. That the cancellation of Barkley's entry on January 14, 1868, left the land in controversy open to selection by any legal applicant. Ryan v. Railroad Co., 99 U. S., 382; Wisconsin Central R. R. Co. v. Price County, 133 U. S., 496.

That as Michael Donovan applied to enter the land in June, 1868, and was wrongfully refused so to do by the local land office, that Donovan still is entitled to enter the land for the reason that the Southern Minnesota Railroad Company did not select the same as indemnity land until November 29, 1870.

There is no question but that the United States can commence and maintain this action so far as its right to do so is concerned. Van Wyck v. Knevals, 106 U. S., 360; United States v. San Jacinto Tin Co., 125 U. S., 273; United States v. Ry. Co., 141 U. S., 358; United States v. Oregon & C. R. Co., 101 Fed. Rep., 316; United States v. Winona & St. Peter R. R. Co., 67 Fed., 969; chap. 376, sec. 2, 24 Stat., 556.

But as it conclusively appears by the record in this case that the United States has no interest in the land itself and that the whole object of the action is to restore the land to the United States in order that they may convey it to Donovan, the case falls within the rule announced in U. S. v. Beebe, 127 U. S., 338, wherein Justice Lamar uses the following language:

"We are of the opinion that when the Government is a mere formal complainant in a suit, not for the purpose of asserting any public right, or protecting any public interest, title, or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the Government designed for the protection of the United States alone."

The fact that this action is claimed to have been brought under the act of March 3, 1887, 24 Stat., 556, can not affect this rule. The act referred to simply confers the right to bring this action after demand and refusal to convey. It does not say that the Government shall recover in any event. If this had been the object of Congress it would have been easier to have divested the title by the act itself, without going into court, which of course could not have been done. Conceding, but not deciding, that the facts show that Donovan obtained a right to the land in controversy superior to the Southern Minnesota Railroad Company, still we are of the opinion that these same facts disclose a case where the doctrine

of laches should be applied. This land was certified to the State of Minnesota March 25, 1871—twenty-two years, lacking a few days, prior to the commencement of this action against the railway companies. The Erichsrud heirs and Woodwick were not brought into the suit by supplemental bill till March 4, 1901, thirty years after said certification.

This action could have been commenced by the United States at
219 any time after the date of certification, and Donovan's knowledge of his claim to this land must be held in this action to be the knowledge of the United States. Donovan was out of possession of the land sixteen years prior to the commencement of this suit against the Erichsrud heirs and Woodwick. By sec. 5134, Gen. Stat. Minn., 1894, actions for the recovery of real estate are limited to a period of fifteen years from the last possession of the plaintiff or his ancestor or grantor. This court in the case of Kelley v. Boettcher, 85 Fed. Rep., 62, exhaustively discussed the rules which govern the application of the doctrine of laches.

Without repeating what is there said, we may state on the authority of the case referred to and the authorities therein cited that the settled rule is that courts of equity are not bound by, but that they usually act or refuse to act in analogy to the statute of limitations relating to actions at law of like character, and that when a suit is brought after the statutory time has elapsed the burden is on complainant to show by proper averment and proof that it would be inequitable to apply the doctrine of laches to his case. We think that the evidence in this case not only does not show that it would be inequitable to apply the doctrine of laches, but on the contrary the evidence shows that in equity and good conscience it ought to be applied. O. C. Erichsrud, as assignee of the contract held by Thompson, paid the balance due on the contract to the Southern Minnesota Railway Company and received a deed for the land in controversy March 20, 1888. At this time Erichsrud seems to have had no notice of the claim of Donovan. Donovan was out of possession and there was no claim of record. On May 24, 1899, when Woodwick purchased the land from the Erichsrud heirs, paying two thousand dollars therefor, O. C. Erichsrud had not been served with subpœna and the heirs were not parties to this action. If Erichsrud was an innocent purchaser, then Woodwick obtained whatever title Erichsrud could convey. This suit, at the time Woodwick purchased, was not lis pendens, as Erichsrud had not been served with subpœna. Murray v. Ballou, 1 Johns. Chancery, 566; Union Trust Co. v. Southern Nav. Co., 130 U. S., 570.

It is claimed that Woodwick cannot be an innocent purchaser, for the reason that he or his grantors never had the legal title. Whether the certification of the land in question under the facts as they appear in this case carried the legal title or whether Woodwick can be said to be in a technical sense an innocent purchaser, we do not care to determine. He certainly occupies a position which appeals to a court of equity to such an extent as to justify this court in refusing relief after the statute of limitations at law has run. The decree below was for the right party and is affirmed.

Filed June 16, 1902.

220 *Decree.*

And on the sixteenth day of June, A. D. 1902, in the record of the proceedings of said circuit court of appeals is a decree in said cause, in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit. May term, 1902.

MONDAY, *June 16, 1902.*

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, The Southern Minnesota Railway Company, Anna Erichsrud, Addie J. Erichsrud, Mabelle H. Anderson, nee Erichsrud, Julia P. Remington, nee Erichsrud, and Louis K. Woodwick.

No. 1740. Appeal from the circuit court of the United States for the district of Minnesota.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Minnesota and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed without costs to either party in this court.

June 16, 1902.

Petition for appeal.

And on the twenty-third day of May, A. D. 1903, a petition for appeal was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit.

221 THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY Company, the Southern Minnesota Railway Company, Anna Erichsrud, Addie J. Erichsrud, Mabel H. Anderson, nee Erichsrud, Julia P. Remington, nee Erichsrud, and Louis K. Woodwick, defendants.

Now comes the United States of America, complainant and appellant in the above-entitled action, by Charles C. Houpt, the United States district attorney for Minnesota, and shows to the court that the matter in controversy herein exceeds in value one thousand dollars besides costs.

And conceiving itself aggrieved by the decree affirming the decree of the circuit court, made and entered in the above-entitled cause on the 16th

day of June, 1902, by the United States circuit court of appeals for the eighth circuit, doth appeal from the decree of said United States circuit court of appeals to the Supreme Court of the United States.

And this appellant prays that said appeal may be allowed and a transcript of the record and proceedings herein, upon which said decree was made, duly authenticated, may be transmitted to the United States Supreme Court.

CHAS. C. HOUPT,
United States Attorney and Attorney for Complainant.

(Endorsed:) No. 1740. United States of America, district of Minnesota. United States circuit court of appeals. The United States of America vs. Chicago, Milwaukee & St. Paul Ry. Co. et al. Petition for appeal. Filed May 23, 1903. John D. Jordan, clerk.

222 *Assignment of errors.*

And on the twenty-third day of May, 1903, an assignment of errors was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY Company, the Southern Minnesota Railway Company, Anna Erichsrud, Addie J. Erichsrud, Mabel H. Anderson, nee Erichsrud, Julia P. Remington, nee Erichsrud, and Louis K. Woodwick, defendants.
Assignment of errors.

Comes now the above-named complainant and appellant, the United States of America, and makes and files the following assignments of error, upon which it will rely in its appeal from the decree of the court above named, made and entered herein on the 16th day of June, 1902, as follows, to wit:

I. That the court erred in holding and deciding that the United States has no interest in the land involved in this controversy, and that the whole object of the action is to restore the land to the United States, so that it may be conveyed to Michael Donovan.

II. That the court erred in holding and deciding that the act of March 3, 1887 (24th Statutes, page 556), does not affect the rule as announced in the first assignment of error herein.

III. That the court erred in holding and deciding that this action could have been commenced by the United States at any time after the date of the certification of the land to the State of Minnesota on March 25, 1871, and that the knowledge of the claimant of said land,
223 Michael Donovan, must be held in this action to be the knowledge of the United States.

IV. The court erred in holding and deciding that the statute of limitations, as expressed in section 5134, General Statutes of Minnesota, 1894, is applicable to the facts of this case.

V. The court erred in finding and deciding that the doctrine of laches is applicable to the facts in this case, and in holding that in equity and in good conscience, such doctrine should be applied.

VI. The court erred in not finding and deciding that the facts show that the claimant, Michael Donovan, obtained a right to the land in controversy, superior to the Southern Minnesota Railway Company, and in holding and deciding that the facts disclose a case where the doctrine of laches should be applied.

VII. The court erred in finding and deciding that the decree in the court below was for the right party, and in affirming the same.

VIII. The appellant further adopts as assignments of error herein, each and all of the assignments made and filed in its appeal from the decree of the court below to this court as fully and to the same extent as if such assignments were repeated and restated, and the same are hereby referred to and made a part of the assignments of error herein.

Wherefore, the appellant prays that the said decree of the circuit court of appeals of the United States for the eighth circuit be reversed, with directions to render and enter a decree in favor of complainant and appellant as against defendants and appellees, in accordance with the prayer for this appeal and the prayer of the amended bill of complaint in this cause.

CHAS. C. HOUPT,
United States District Attorney for Minnesota.

(Endorsed:) No. 1740. United States of America, district of Minnesota. United States circuit court of appeals. The United States of America vs. Chicago, Milwaukee & St. Paul Ry. Co. et al. Assignments of error. Filed May 23, 1903. John D. Jordan, clerk.

224 *Order allowing appeal.*

And on the twenty-third day of May, A. D. 1903, an order allowing an appeal was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit.

THE UNITED STATES OF AMERICA, APPELLANT, *vs.* CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY Company, the Southern Minnesota Railway Company, Anna Erichsrud, Addie J. Erichsrud, Mabel H. Anderson, née Erichsrud; Julia P. Remington, née Erichsrud, and Louis K. Woodwick, appellees.	No. 1740. Appeal from the circuit court of the United States for the district of Minnesota.

This date came the United States of America, by Charles C. Houpt, the United States district attorney for Minnesota, and presented his petition for an appeal from the decree of this court to the Supreme Court of the United States, on consideration whereof this court finds that the matter in controversy exceeds in value one thousand dollars besides

costs, and that the United States is entitled to an appeal to the Supreme Court of the United States, and the same is hereby allowed.

WALTER H. SANBORN,
Circuit Judge.

Dated this 23 day of May, A. D. 1903.

(Endorsed:) No. 1740. United States of America, district of Minnesota. United States circuit court of appeals. The United States of America vs. Chicago, Milwaukee & St. Paul Ry. Co. et al. Order allowing appeal. Filed May 23, 1903. John D. Jordan, clerk.

225 *Citation.*

And on the first day of June, A. D. 1903, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which, with the admission of service endorsed thereon, is in the words and figures following, to wit:

226 United States circuit court of appeals, eighth circuit.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, the Southern Minnesota Railway Company, Anna Erichsrud, Addie J. Erichsrud, Mabel H. Anderson, nee Erichsrud, Julia P. Remington, nee Erichsrud, and Louis K. Woodwick, defendants.

THE UNITED STATES OF AMERICA, *ss:*

To the following-named defendants: Chicago, Milwaukee and St. Paul Railway Company, Southern Minnesota Railway Company, Anna Erichsrud, Addie J. Erichsrud, Mabel H. Anderson, nee Erichsrud, Julia P. Remington, nee Erichsrud, and Louis K. Woodwick:

You are hereby cited and admonished to appear at the Supreme Court of the United States, at the city of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to an appeal duly taken and allowed from that certain decree of the United States circuit court of appeals for the eighth circuit, in that certain cause wherein the United States of America is complainant and appellant, and you, the said Chicago, Milwaukee and St. Paul Railway Company, Southern Minnesota Railway Company, Anna Erichsrud, Addie J. Erichsrud, Mabel H. Anderson, nee Erichsrud, Julia P. Remington, nee Erichsrud, and Louis K. Woodwick are defendants and appellees, to show cause, if any there be, why the order and decree of affirmance of said circuit court of appeals entered therein on the 16th day of June, 1902, and in said appeal mentioned, and for which said appeal is taken, should not be set aside and corrected, and why speedy justice should not be done in the premises.

Witness the honorable Walter H. Sanborn, judge of the circuit court of the United States, this 23 day of May, in the year of our Lord one thousand nine hundred and three.

WALTER H. SANBORN,
Circuit Judge.

227 Due and personal service of the foregoing citation, by receipt of a true copy thereof, is hereby admitted this 26th day of May, 1903.

BURTON HANSON,
W. H. NORRIS,
Solicitors for the Chicago, Milwaukee and St. Paul and the Southern Minnesota Railway Companies.

Personal service of the foregoing citation, by receipt of a true copy thereof, is hereby admitted this 28 day of May *May*, 1903.

ANDREW C. DUNN,
Solicitors for Defendants Anna Erichsrud, Addie J. Erichsrud, Mabel H. Anderson, nee Erichsrud, Julia P. Remington, nee Erichsrud, and Louis K. Woodwick.

228 (Indorsed:) Original. United States of America, district of Minnesota, United States circuit court of appeals. The United States of America vs. Chicago, Milwaukee and St. Paul Ry. Co. et al. Citation. I hereby admit service of a copy of within citation this 28th day of May, 1903. Andrew C. Dunn. Filed Jun' 1, 1903. John D. Jordan, clerk.

229 *Clerk's certificate.*

United States circuit court of appeals, eighth circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing two hundred twenty-nine pages contain full, true, and complete copies of all the pleadings, proceedings and record entries, including the opinion of said circuit court of appeals, in a certain cause wherein The United States of America was appellant, and the Chicago, Milwaukee and St. Paul Railway Company et al. were appellees, No. 1740, May term, 1902, as full, true, and complete as the same remain on file and of record in my office.

I do further certify that the mandate in said cause was issued to the circuit court of the United States for the district of Minnesota on the twenty-seventh day of August, A. D. 1902.

I do further certify that the original citation, with the admission of service endorsed thereon, is hereto attached and herewith returned.

In testimony whereof I hereunto subscribe my name and affix the seal of said circuit court of appeals at office in the city of St. Louis, Missouri, in the eighth circuit, this fourth day of June, A. D. 1903.

[SEAL.] JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

230 (Indorsement on cover:) File No. 18968. U. S. C. C. of appeals, 8th circuit. Term No. 317. The United States, appellant, vs. Chicago, Milwaukee & St. Paul Railway Company et al. Filed June 9", 1903. Office of the clerk Supreme Court U. S. Received Jun'. 9,1903.

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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, APPELLANT,
v.
CHICAGO, MILWAUKEE AND ST. PAUL Railway Company et al. } No. 54.

STATEMENT OF CASE.

(a) Nature of the Suit.

This suit was instituted in the name of the United States, by authority of the Attorney-General, in the United States circuit court for the district of Minnesota, second division, under and pursuant to the act of March 3, 1887 (24 Stats., 556) for the purpose of having restored to the United States the east half of the northwest quarter, section 35, township 101, range 28, west of the fifth principal meridian, being eighty (80) acres of farming land located in the county of Faribault, in the State of Minnesota. The United States avers in its bill that on the 29th day of November, 1870, the Southern Minnesota Railroad Company, *improperly and without authority of law, selected such tract of land as within the indemnity limits of said road, in*

lieu of lands situated within the place limits of the grant made to the State of Minnesota for the benefit of said road, under the act of Congress approved July 4, 1866 (14 Stats., 87), and that thereafter, to wit, on the 25th of March, 1871, the Land Department of the United States, *erroneously and without authority of law, certified to the State of Minnesota said tract of land* so selected by said railroad company for the benefit of said railroad.

(b) The Government's Claim.

The claim of the United States is substantially as follows:

On the 10th day of September, 1866, the governor of the State of Minnesota, having theretofore filed or caused to be filed with the Secretary of the Interior maps designating the route of said road, the Secretary of the Interior, as required by section 5 of the act of July 4, 1866, withdrew from market "the lands embraced within the provisions of said act." At the time of such withdrawal there was a valid homestead claim on the land in controversy, which had been made by one Luman Barclay on June 21, 1866. In the following year, to wit 1867, Michael Donovan submitted conclusive proof before the local land office that Luman Barclay had abandoned his homestead claim, and on the 14th day of January, 1868, Barclay's homestead entry was duly canceled by the Land Department of the Government, and Donovan was duly notified of such fact. The cancellation of Barclay's entry left the land in controversy open to selection by

the first legal applicant (*Ryan* v. *Railroad Co.*, 99 U. S., 382; *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S., 496). On June 6, 1868, Donovan went to the local land office and applied to enter the land embraced within the homestead entry of Luman Barclay, 80 acres of which was the land here in controversy. The claim of the Government is that the local land office unlawfully and wrongfully refused to permit Donovan to enter as a homestead the land here in question, and that he is still entitled to enter said land, for the reason that the Southern Minnesota Railroad Company did not select the same as indemnity land until November 29, 1870, prior to which time Donovan had entered upon and taken possession of said land with a view to entering the same under the homestead laws of the United States, and that the certification from the United States to the railroad company was not merely voidable but absolutely void.

(c) Facts Relating to Donovan's Claim of Title.

The facts in this case are briefly as follows:

On the 4th day of July, 1866, Congress made a grant of land to Minnesota to aid in the construction of a railroad in the southern part of that State. The grant was of the odd-numbered sections within ten (10) miles of the line of the road, as the same should be located, with the right to select indemnity lands within twenty (20) miles of the line, in lieu of lands within the ten (10) mile place limits. The grant was turned

over by the State of Minnesota to the Southern Minnesota Railroad Company on February 25, 1867. (Stipulated facts, Record, p. 113.)

Prior to the passage of said granting act, to wit, on the 21st day of June, 1866, one Luman Barclay duly entered the east half of the northwest quarter of section 35, township 101, range 28, west of the fifth principal meridian, in Faribault County, Minn., being the land in controversy in this suit, in connection with the adjoining 80-acre tract in section 26 of said township and range, as a homestead. In the following year, to wit, 1867, Barclay was called to Canada and was absent for over six months. He wrote to a friend living near this land, stating that he would not return to the United States to claim his homestead, and that it could be taken by anyone else.

At that time one of the appellees, Michael Donovan, had arrived with his family from Wisconsin and was stopping with a friend near Winnebago City, where the local land office of the United States was then located. Donovan had come to Minnesota in 1867 for the purpose of acquiring a homestead on Government land, and was informed of the action of Luman Barclay. He accordingly went upon and examined this Barclay land, and having concluded to enter it as a homestead, went to the United States local land office for that purpose. There he was informed by the register of the land office that he could not enter this land as a homestead until the Barclay entry was canceled, and that if he wished to make a claim that Bar-

clay had abandoned his entry he should publish notice of the time and place where he would make proof upon that matter. Donovan accordingly paid $9 for the cost of publishing such a notice for three weeks, and appeared at the time and place designated, to wit, the fore part of August, 1867, and made conclusive proof that Barclay had abandoned his homestead claim. Nothing was said at that time about any of the land having been withdrawn from market or that it would not be subject to a homestead claim when the Barclay entry was canceled, but Donovan was given to understand that he could enter the land as a homestead as soon as the local land office received notice from the General Land Office at Washington that the Barclay entry was canceled. Donovan accordingly had an application made out to enter both tracts of land, leaving the date blank, to be filled in when he should apply to enter the land after the cancellation of the Barclay entry, and left the same with the local land office and returned onto the land which he had applied to enter, and commenced the erection of a house on the tract in section 26 and commenced the cultivation of the tract in section 35. This was in the fall of the year 1867.

The Barclay entry was duly canceled by the land department of the Government on the 14th day of January, 1868, and notice given to the local land office, and Donovan was notified of that fact. On or about the 6th day of June, 1868, Donovan went to the local land office again and applied to enter said tracts of land, but he was then informed by Mr. Bullis, register of the

land office, that the land within 20 miles of the line of road had been withdrawn from the market, and that the 80-acre tract in said section 35 was within the indemnity limits of the grant and within 20 miles of the located line of road, and that, therefore, he, Donovan, would not be permitted or allowed to enter the 80 acres in section 35 as a part of his homestead. Donovan was thereupon allowed to enter the 80-acre tract in section 26, but was prevented by the local land officers from entering the 80-acre tract in section 35. When Donovan initiated the contest against Barclay in 1867, he signed a paper which was called an application to enter the land in controversy. This paper was in blank as to date, and it was undoubtedly to be filled out when the Barclay entry should be canceled, but when the entry was canceled this paper was destroyed. It was claimed by the local land office that the land was not subject to entry, for the reasons hereinbefore stated. Donovan used the land in connection with his 80-acre homestead in section 26 from the fall of 1867 up to the year 1885, when one Thomas Thompson went into possession of the same, as assignee of the contract made by the Southern Minnesota Railway Company, and under and in pursuance to which, title to the land was finally conveyed to O. C. Erichsrud. On the 26th day of June, 1883, Donovan duly applied at the local land office to enter as a homestead said tract of land in said section 35, which application was rejected upon the ground that the land so applied for had been certified to the State

of Minnesota for the benefit of said railroad company, from which refusal Donovan duly appealed to the Commissioner of the General Land Office, where said matter is still pending and undetermined. This application of Donovan to enter the tract of land in 1883 was duly filed, and his rights thereunder were determined by the local land office at that time. Donovan has not been in possession of the land since 1885. The circuit court, although denying that Donovan had any right to enter the 80-acre tract in question, yet found as a fact (Record, p. 203) that Donovan applied to enter the land on June 6, 1868, after the Barclay entry had been cancelled. The court's finding upon this subject is in the following words:

> It appears that he did apply to enter this land as a homestead in the following June, and after the action of the General Land Office directing the vacation of the previous entry had been noted on the records of the local land office.

It appears also that after Donovan had occupied these lands for more than five years, he made proof of his occupation and cultivation in 1875 of the 80-acre tract in section 26, and at the same time offered to make like proof of his occupation and cultivation of the 80-acre tract in section 35. The court below also found that Donovan not only applied to enter the tract in section 35, but also paid the cost thereof, to wit, fifteen dollars ($15), of which ten dollars ($10) was the price of the land, and five dollars ($5) the expenses connected therewith. (Record, p. 66.)

(d) Facts Relating to the Railroad Company and its Grantees.

The land in controversy is within the indemnity limits of the act of July 4, 1866 (14 Stats., 87).

On November 29, 1870, the Southern Minnesota Railroad Company selected the 80-acre tract of land in controversy in lieu of lands within the place limits, and the land department certified said land to the State of Minnesota for the benefit of said railroad company on March 25, 1871, and the State of Minnesota conveyed said land to the railroad company August 8, 1871. This land, as above stated, was sold under a mortgage foreclosure to A. P. Mann and H. H. Camman in February, 1877. It was conveyed by Mann and Camman to the Southern Minnesota Railway Company March 3, 1877, and by said railway company conveyed to O. C. Erichsrud on March 20, 1888.

The Southern Minnesota Railroad Company should be distinguished from the Southern Minnesota Railway Company. The Southern Minnesota Railroad Company, in March, 1868, made a mortgage upon its property, including said land grant, to secure an issue of bonds, which mortgage was foreclosed in the United States circuit court for Minnesota in 1877, and the mortgaged property duly sold to A. P. Mann and H. H. Camman in trust for the bondholders secured by said mortgage; and thereafter, on the 3d day of March, 1877, the said purchasers, under the laws of the State of Minnesota, duly organized a new corporation, by the name of the Southern Minnesota Railway Com-

pany, and conveyed to said railway company all said property so purchased at said foreclosure sale.

Prior to the conveyance to Erichsrud by the railway company, to wit, on the 5th day of January, 1885, the railway company entered into a contract with one A. Boysen for the sale and conveyance of said land to Boysen, which said contract on the following day was assigned to one N. C. Fredericksen, and on the 1st day of April, 1885, was assigned by Fredericksen to Thomas Thompson, and by said Thompson was, on the 3d day of February, 1888, assigned to O. C. Erichsrud. O. C. Erichsrud died intestate on March 27, 1888, and on November 6, 1898, the land in controversy was decreed by the probate court of Faribault County, Minn., to Anna Erichsrud, widow of deceased, Addie J. Erichsrud, Julia P. Erichsrud, and Mabel H. Erichsrud, as heirs at law of O. C. Erichsrud, deceased. On May 24, 1899, these heirs at law conveyed the same to the defendant Louis K. Woodwick for the sum of two thousand dollars ($2,000) cash.

(e) Facts Relative to the Controversy Between Donovan and Thompson.

The railroad company having, on the 5th day of January, 1885, by a contract in writing, agreed to sell said tract of land in question in section 35 to Boysen, and said contract having been assigned to Fredericksen and by him assigned to Thompson, on the 1st day of April, 1885, said Thompson, shortly after receiving the assignment of said land, forcibly took possession of the

tract of land in question, which had been in possession of said Donovan for about eighteen years, and was then under cultivation. Donovan, upon being dispossessed of said land by Thompson, brought an action in the State court to regain possession of said tract. This suit was instituted in 1885, in the district court of Faribault County. The case was pending in that court for about two years, when on the 24th of March, 1887, the State court decided that Donovan had no title to said land, nor right to possession of the same, and that Thompson had the right to the possession thereof under the Boysen contract, which had been assigned to, and held by, Thompson. Judgment was not entered, however, in said case, until the 4th day of January, 1888 (Rec., p. 185). (With reference to the commencement of the suit and possession, see Rec., p. 116.)

In 1888, after the passage of the act of Congress of March 3, 1887, Donovan, having been beaten in the State court, appealed to the Land Department at Washington for relief under said act of Congress, which application is evidenced by the affidavits of Donovan, Mr. Bullis, and Mr. McLaughlin. (Rec., pp. 88, 89, 90.) The letter from the Commissioner of the General Land Office to the Secretary of the Interior relative to Donovan's claim will be found on page 118 of the record, and the letter of the Secretary of the Interior to the Commissioner of the General Land Office upon the subject will be found on page 120 of the record, and the letter of the Commissioner in reply to the Secretary appears on page 127 of the record. On April 16, 1890,

the Secretary of the Interior having found that Donovan was unlawfully and wrongfully deprived of his right to enter the land in controversy, and that the railroad company and its grantees had no title thereto, addressed a letter to the Attorney-General (Rec., p. 128), transmitting the papers in said case, with the request that suit be instituted to have the certification of said land to the State of Minnesota set aside and canceled. It thus appears that by direction of the Secretary of the Interior this suit was instituted in 1893 by the Attorney-General of the United States, and has been pending ever since that time.

At the time of the commencement of this suit, the defendants—O. C. Erichsrud and Thomas Thompson—were not found or served with process, Erichsrud having died March 27, 1888—five years before the commencement of this suit. On May 24, 1899, Erichsrud's widow and children conveyed the land in question by warranty deed, to the defendant Woodwick, all of whom have since been made parties defendant by supplemental bill filed March 4, 1901. (See stipulated facts, Roman Numeral VIII, Rec., p. 115.)

(f) Facts Relating to the Suit.

On March 6, 1893, the United States filed its bill of complaint in the above-entitled cause against the Chicago, Milwaukee and St. Paul Railway Company, the Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thompson, and O. C. Erichsrud. (Rec., pp. 1–8.) On the 20th day of June, 1894, the

United States filed an amendment to said bill of complaint, under and pursuant to an order of court.

Service of subpœna was made on the railway companies and Donovan, and on August 11, 1894, said companies answered the bill. Donovan did not answer the bill until March 6, 1901, and then by his answer confessed the same and prayed that the relief asked for might be granted. On March 4, 1901, a supplemental bill was filed by the United States in said action, wherein it was stated that no service had ever been made upon Thompson or Erichsrud, and that no testimony had ever been taken in the case; that O. C. Erichsrud had departed this life since the commencement of the action, leaving surviving him Anna Erichsrud, his widow, Addie J. Erichsrud, Mabelle Erichsrud, and Julia P. Erichsrud, his children, and only heirs at law, and that on June 24, 1899, said heirs had joined in a deed conveying the land in question to Louis K. Woodwick. *This supplemental bill further stated that such suit by stipulation or understanding of counsel had not been moved, but was allowed to stand over, without prejudice, awaiting the decision of certain cases pending in the United States Supreme Court, which it was thought might have a bearing upon the facts in said suit.* Process was prayed against these last-named defendants, and on May 2, 1901, Anna Erichsrud, Addie J. Erichsrud, Mabelle H. Anderson (formerly Erichsrud), Julia P. Remington (formerly Erichsrud), and Louis K. Woodwick answered the bill and supplemental bill. Replication having been filed to said several separate

answers, the court appointed a special examiner to take and report the testimony in the case, and return the same to the court. (Rec., p. 46.) On the 13th day of January, 1902, the special examiner submitted to the court his report of the testimony taken in said suit. (Rec., p. 195.)

SPECIFICATION OF ERRORS RELIED UPON.

The appellant complains of certain errors committed by the circuit court of appeals and of certain other errors committed by the circuit court. In our opinion, it is not only necessary to consider the errors which we allege were committed by the circuit court of appeals in rendering its decision in this case, but also the errors committed by the circuit court.

(a) Errors Complained of in the Circuit Court of Appeals.

I. The circuit court of appeals erred in holding and deciding that the United States had no interest in the land involved in this suit, and that the whole object of the action is to restore the land to the United States so that it may convey to Michael Donovan.

II. That court also erred in holding and deciding that the act of March 3, 1887 (24 Stat., 556), does not affect the rule as announced in the case of the *United States* v. *Beebe* (127 U. S., 338).

III. The court erred in holding and deciding that the statute of limitations, as expressed in section 5134, General Statutes of Minnesota, 1894, is applicable to the facts in this case.

IV. The court erred in finding and deciding that the doctrine of laches is applicable to the facts in this case, and in holding that in equity and in good conscience such doctrine should be applied.

V. The court erred in not finding and deciding that the facts show that the claimant, Michael Donovan, obtained a right to the land in controversy, superior to the Southern Minnesota Railway Company.

VI. The court erred in finding and deciding that the decree in the court below was for the right party, and in affirming the same.

(b) Errors Complained of in the Circuit Court.

I. The circuit court erred in holding that the lands within the indemnity limits of the grant were withdrawn from market on September 10, 1866, and in holding that the cancellation of the Barkley entry on January 14, 1868, did not restore the lands to market and therefore that the application to enter the land in question by Donovan was properly rejected.

II. The circuit court erred in refusing to find as a fact from the evidence that Donovan took possession of the land in question at the time of his application to enter the same, and immediately improved and cultivated and continued in the sole and uninterrupted possession of the same, occupying and cultivating it as required by law, continuously, down to the year 1885; and having fully complied with all the requirements of the law with respect to homesteading said land secured a vested interest in the land of which he could not be deprived by an act of Congress.

III. The circuit court erred in holding that the defendant Woodwick had title to said land under the act of March 3, 1887.

IV. The court erred in failing and refusing to hold that the certification of the tract of land in question by the Land Department to the State of Minnesota was absolutely void and passed no title.

V. The court erred in not holding that the plea of the statute of limitations and of laches could be invoked against the Government in this suit.

POINTS, AUTHORITIES, AND ARGUMENT.

In the argument of this case some confusion may be avoided by arranging the points to be discussed in their proper order. We have accordingly divided the argument into three parts, as follows:

(1) Errors committed by the circuit court of appeals.

(2) Errors committed by the circuit court and disregarded by the circuit court of appeals.

(3) The real point upon which this case must be decided, all others having been resolved in favor of the Government.

PART ONE.

ERRORS COMMITTED BY THE CIRCUIT COURT OF APPEALS IN ITS DECISION.

There are several legal propositions enunciated by the circuit court of appeals in its opinion, which, while in the abstract are correct statements of the law, are not applicable to the facts as disclosed by the record in this case and to which we take exception.

I.

When the Government is a *mere formal* complainant in a suit, not for the purpose of asserting any legal right or protecting any public interest, title, or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the Government designed for the protection of the United States alone.

United States v. Beebe (127 U. S., 338.)

The circuit court of appeals held that the case at bar should be decided in accordance with the principle of law laid down by this court in the Beebe case (*supra*), and held that "it conclusively appears by the record in this case that the United States has no interest in the land itself, and that the whole object of the action is to restore the land to the United States in order that it may convey it to Donovan," and "the fact that this

action is claimed to have been brought under the act of March 3, 1887 (24 Stat., 556), can not affect this rule."

Our contention is that there is a clear distinction between the interest which the Government has in the prosecution of this case and the interest which it had in the prosecution of the Beebe case. It is not necessary that the United States should have a pecuniary interest in the lands sought to be recovered, and we maintain that the United States could possibly have no greater interest in the lands sought to be recovered in this suit than has been manifested in the positive assertion on the part of Congress by the act of March 3, 1887, that the Government should henceforth undertake as a part of its avowed policy, not only the adjustment of these various land grants to railroad companies, but should assume and conduct all litigation for and in behalf of its citizens who had been deprived of their rights under its homestead and preemption laws, and that the prosecution and determination of their rights as against the railroad companies should be conducted by the Government, in order that its citizens might enjoy the benefit of their rights under the law.

We maintain that the circuit court of appeals has entirely misconstrued the purpose and object of the act of Congress of March 3, 1887. The Government, by the passage of that law, invited settlers in the situation in which Donovan found himself, contending single handed and alone against a great corporation, to commit their cause to its charge, and that it would undertake, as a governmental function and a matter in

which the Government should thereafter have a direct and positive interest, the litigation of their controversies with the railroad companies. This is evident, not only from a careful examination and analysis of the law itself, but also from the decisions of the courts which have been rendered wherein this act has received judicial consideration. We expect to show that this was the purpose of Congress; first, from an examina- of the act under which this suit was instituted, and second, from the decisions of the Federal courts in cases brought under the provisions of said act.

Act of March 3, 1887 (24 Stat., 556).

We maintain that Judge Carland, in delivering the opinion of the circuit court of appeals in the case at bar, has neglected to give proper consideration and significance to the object and purpose of the various provisions of the act of March 3, 1887.

The court says:

> The act referred to simply confers the right to bring this action after demand and refusal to convey. It does not say that the Government shall recover in any event. If this had been the object of Congress, it would have been easier to have divested the title by the act itself without going into court, which of course could not have been done. (116 Fed. Rep., 972.)

The most superficial examination of this law shows very clearly that Congress intended to do more than "simply confer the right to bring this action after demand and refusal to convey."

The first section of the act is as follows:

> That the Secretary of the Interior be, and is hereby, authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

This provision of the law imposes a direct and positive obligation upon the Secretary of the Interior to adjust railroad land grants. The Secretary of the Interior is not only authorized to make such adjustment, but is directed to do so.

Section 2 of said act is as follows:

> That if it shall appear, upon the completion of such adjustments respectfully, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented, by the United States, to or for the use or benefit of any company claiming by, through, or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands,

and to restore the title thereof to the United States.

Section 3 of the act is as follows:

> That if, in the adjustment of said grants, it shall appear that the homestead or preemption entry of any bona fide settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights and allowed to prove his entry by complying with the public land laws: *Provided*, That he has not located another claim or made an entry in lieu of the one so erroneously canceled: *And provided also*, That he did not voluntarily abandon said original entry: *And provided further*, That if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to bona fide settlers residing thereon.

These three sections of the law above quoted must be interpreted and considered together, and it seems to me that the only reasonable inference which can be drawn is that the Government has assumed an interest in the prosecution of this suit which can not be confined to a pecuniary interest, and that the circuit court of appeals did not give sufficient importance to the object of the law when it said that "the act simply confers

the right to bring this action after demand and refusal to convey."

But it was necessary for the circuit court of appeals to thus minimize and limit the interest of the Government in the prosecution of this suit, under this act, in order to bring the case within the rule of law announced in the case of the *United States* v. *Beebe* (*supra*). The whole decision of the circuit court of appeals is constructed upon the assumption that this case is ruled by the principle of law announced in the Beebe case, and that the act of March 3, 1887, confers upon the Government no additional interest in the event of a suit, either pecuniary or otherwise. If this premise can be shown to be fallacious, the whole argument which sustains the opinion of the circuit court of appeals in the case at bar falls to the ground. It is, however, unnecessary, plain as is the construction of the statute, to rest our assertion here. This statute has received the careful consideration, not only of this court, but of the circuit court of appeals of the eighth circuit, whose decision we are now assailing.

United States v. Winona and St. Peter Railroad Co. (67 Fed. Rep., 969, 971).

> It may be conceded that if Marshall, the preemptor, had brought a suit in 1891, when this suit was commenced, to obtain a decree to the effect that the title of the land company was held by it in trust for him, the statute of limitations of Minnesota and his own laches would have defeated him. (*Railroad Co.* v. *Sage*, 4 U. S.

App., 160, 1 C. C. A., 256, and 49 Fed., 315.) Nor is it denied that "when the Government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title, or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the Government designed for the protection of the rights of the United States alone." (*United States* v. *Beebe*, 127 U. S., 338, 347, 8 Sup. Ct., 1083; *Curtner* v. *United States*, 149 U. S., 662, 674, 13 Sup. Ct., 985, 1041.) But the United States sustains no such relation to this suit. The act of Congress of March 3, 1887 (24 Stat., 556), made it the duty of the Secretary of the Interior to adjust the land grant of the Winona Company, and to demand the reconveyance to the United States by that company of any lands erroneously certified to the State for the benefit of the company. This tract of land was erroneously certified for the benefit of the Winona Company, and the Secretary demanded its reconveyance. The act of Congress required the Attorney-General, in case the railroad company should fail to reconvey the land within ninety days after the demand of the Secretary, to bring this suit or a like proceeding to cancel the certification to the State and to restore the title of the land to the United States. The railroad company failed to reconvey for ninety days

after demand, and the Attorney-General exhibited this bill as the act of Congress directed him to do. The only evidence tending to show that this suit was instigated by Marshall, or that it is prosecuted for his benefit, is the fact that he filed a petition with the Commissioner of the General Land Office in November, 1887, for a reinstatement of his preemption rights. It can not be presumed that this petition was the only or the approximate cause of the institution of a suit which Congress had directed to be brought in any event. It was the duty of the Secretary of the Interior and the Attorney-General to investigate this case and to prosecute this suit, regardless of the application of Marshall. That the faithful discharge of the duties of Government may result in the protection or restoration of the rights of individuals does not deprive those duties of their public character or privileges. Moreover, the United States is not without interest in this suit. If Marshall's claims as a preemptor are ultimately sustained, the Government will receive from him at least the minimum price of the land (sec. 2259 Rev. Stat.); and, if they are not sustained, they will have the land itself.

Our conclusion is that the United States has a pecuniary interest in the result of this suit; that it is brought and is prosecuted by the direction of Congress to protect the public interests and to discharge the duties imposed upon the United States as a sovereign Government; and that the Government is entitled to the benefit of its exemption from the statute of limitations and

> from laches in this case. The decree below must be reversed and the cause remanded, with directions to enter a decree for the relief prayed in the bill; and it is so ordered.

This opinion of Judge Sanborn is perhaps one of the best considered opinions wherein the act of March 3, 1887, has received consideration by the Federal courts. A suit instituted under this law, so far as the Government's interest in the event of the suit is concerned, is clearly distinguished from those suits of which the Beebe case is a good example. The circuit court of appeals recognized in positive language that the United States, in a suit brought under this law, was something more than a mere conduit through which one private person was conducting litigation against another private person. "It can not be presumed," said the court, "that this petition was the only or approximate cause of the institution of a suit which Congress had directed to be brought in any event. It was the duty of the Secretary of the Interior and the Attorney-General to investigate this case, and to prosecute this suit, regardless of the application of Marshall. That the faithful discharge of the duties of government may result in the protection or restoration of the rights of individuals does not deprive those duties of their public character or privileges." It is true that the court went on to say, under the peculiar facts in that case, because it happened to be a preemption case instead of a homestead case, that "the United States is not without interest in this suit. If Marshall's claims as a preemptor are ultimately sustained, the Government will

receive from him at least the minimum price of the land (sec. 2259, R. S.); and if they are not sustained, they will have the land itself." But our contention is that the principle of law which the circuit court of appeals enunciated in rendering the opinion in the Marshall case, and which was thereafter affirmed by this court, would have been just as sound had the Government no pecuniary interest in the result of the suit. The Government's interest, under the act of 1887, in the discharge of those duties and privileges of a public character, was sufficient to except it from the ruling in the Beebe case.

Oregon and California Railroad Co. v. United States (189 U. S., 103, 104).

This was a suit brought under the act of Congress of March 3, 1887, to compel the reconveyance of lands covered by patent issued in 1893, on the ground that it included land to which there were adverse claims of settlers to the land on which they respectively resided, and which the United States now claimed for them.

Mr. Justice Harlan, in delivering the opinion of the court, took occasion to point out the purposes which Congress had in mind when it passed this law. He said:

> In *United States* v. *Missouri, &c., Railway* (141 U. S., 360, 380, 382), which was an action brought by the United States after the passage of the above statute to have certain patents for land canceled, this court, after observing that

as to some of the lands the United States appeared to have a direct interest in them, said: "As to others, it is under an obligation to claimants under the homestead and preemption laws to undo the wrong alleged to have been done by its officers, in violation of law, by removing the cloud cast upon its title, by the patents in question, and thereby enable it to properly administer these lands, and to give clear title to those whose rights, under those laws, may be superior to those of the railway company. A suit, therefore, to obtain a decree annulling the patents in question, so far as it is proper to do so, was required by the duty the Government owed as well to the public, as to the individuals who acquired rights, which the patents, if allowed to stand, may defeat or embarrass." Reference was made in that case to *United States* v. *San Jacinto Tin Co.* (125 U. S., 273, 286), in which it was held that the United States could sue to set aside a patent improperly issued, where it appeared that there was an obligation on the part of the United States to the public, or to any individual, or where it had any interest of its own; also, to *United States* v. *Beebe* (127 U. S., 338, 342), in which it was held that patents procured by fraud could be canceled at the suit of the United States where that was necessary to be done in order that it might fulfill its obligations to others. The court then observed: "These principles equally apply where patents have been issued by mistake, and they are specially applicable where, as in the present case, a multiplicity of suits, each

one depending upon the same facts and upon the same questions of law, can be avoided, and where a comprehensive decree, covering all contested rights, would accomplish the substantial ends of justice." (See also *United States* v. *Oregon, &c., Railroad Co.*, 176 U. S., 28.)

Our conclusion is that Congress, by the enactment of this law, clearly recognized the difficulty and great expense which individual claimants would be compelled to meet were they to conduct litigation of this character in their own name. The Government, therefore, invited such claimants to place their controversies with the railroad companies and their grantees under the full charge and control of the Attorney-General. And not only did Donovan, but hundreds of other settlers, after the enactment of this law, accept the invitation of the Government to litigate the rights of which they had been deprived by the negligence and and wrongful acts of the officers of the Government. And the interest of the Government, in the event of such suits, is to be measured, not according to the money value which the Government might realize, but in accordance with the interest which the Government has declared itself to have in seeing to it that these land grants are properly adjusted, and that the individual claimants who are entitled to the land may be permitted to enter the same under the protection of the Government and at the expense of the Government.

Having shown, therefore, that the circuit court of appeals was in error when it held that this case fell within the principle of law announced in the Beebe

and San Jacinto cases, it is apparent that the subsidiary question of negligence and laches upon the part of Donovan can have no application in the further consideration of this case, for if the Government has an interest, as we assert, the doctrine of laches can have no application to the case at bar. We will, however, at the risk of considering a question which we deem immaterial, briefly discuss the second point made by the circuit court of appeals, viz., that this case is one in which the doctrine of laches should be applied.

II.

The laches, if any, were the laches of the officers of the United States, and not of Donovan.

We have no fault to find with the opinion of the circuit court of appeals for the eighth circuit in the case of *Kelly* v. *Boettcher* (85 Fed. Rept., 55, 62), in which the rules which govern the application of the doctrine of laches are exhaustively discussed.

The rule as stated in that case is as follows:

> The settled rule is that courts of equity are not bound by, but that they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character.
>
> * * * * *
>
> When a suit is brought within the time fixed by the analogous statute the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches; and when such a

> suit is brought after the statutory time has elapsed the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case.

After stating the rule as above quoted, the circuit court of appeals said:

> We think that the evidence in this case not only does not show that it would be inequitable to apply the doctrine of laches, but, on the contrary, the evidence shows that in equity and good conscience it ought to be applied. O. C. Erichsrud, as assignee of the contract held by Thompson, paid the balance due on the contract to the Southern Minnesota Railway Company, and received a deed for the land in controversy March 20, 1888. At this time Erichsrud seems to have had no notice of the claim of Donovan. Donovan was out of possession, and there was no claim of record. On May 24, 1899, when Woodwick purchased the land from the Erichsrud heirs, paying $2,000 therefor, O. C. Erichsrud had not been served with subpœna, and the heirs were not parties to this action. If Erichsrud was an innocent purchaser, then Woodwick obtained whatever title Erichsrud could convey. This suit, at the time Woodwick purchased, was not lis pendens, as Erichsrud had not been served with subpœna. (*Murray* v. *Ballou*, 1 Johns., Ch. 566; *Union Trust Co.* v. *Southern Inland Nav. and Imp. Co.*, 130 U. S., 570, 9 Sup. Ct., 606, 32 L. Ed., 1043.)

We contend that the circuit court of appeals failed to give due consideration to the equities in applying the doctrine of laches to the facts in this case.

Michael Donovan settled upon this 80-acre tract in 1867, and in June, 1868, when the land was open to selection and subject to entry by the first legal applicant as a part of the public domain, Donovan applied to the local land office to enter this 80-acre tract as a part of his homestead, and was wrongfully and illegally prevented from so doing by the officers of the Government. He, however, went back upon the land and continued to cultivate and improve it until 1875, when he offered "to prove up on it," along with his final proof made at that time before the local land office with respect to the adjoining 80-acre tract in section 26. He was again refused permission so to do, but he still continued to reside upon and to cultivate the land from that time until 1885, when he was dispossessed by Thompson. In 1883 Donovan again applied to enter the land, but his application was rejected by the local land office. This application was, however, remanded, and an appeal taken by Donovan to the Commissioner of the General Land Office, where the matter is still pending. Donovan thereupon brought suit in the State court for the purpose of asserting his right to the possession of the land, and the case was held by that court under consideration for more than two years, when judgment was rendered against him in 1888. In the meantime, on March 3, 1887, Congress had passed this act, practically inviting Donovan, together with thousands of other settlers, to submit their litigation with the railroad companies and their grantees to the Secretary of the Interior and the Attorney-General. Dono-

was immediately accepted this invitation and did everything in his power to secure a speedy determination of this controversy. It is true that he neglected to take an appeal from the decision of the State court. But if the United States then had an interest in this land, the judgment of the State court was clearly no bar to a prosecution of this suit by the United States, and inasmuch as the Government had assumed this duty under the law to litigate this controversy with the railroad company, Donovan was certainly justified in submitting his interests to the control of the Government. The Attorney-General instituted this suit in 1903, and the railroad companies only were served with subpœnas. It was clearly not the duty of Donovan to see to it that service was properly made upon all the defendants in that suit, or that all persons interested in the land were made parties. In 1907 the United States filed a supplemental bill bringing in additional parties, and omitting "that said action by stipulation or understanding of counsel was not moved but was allowed to stand over, without prejudice, awaiting the decision of certain cases which it was thought might have a bearing upon this action." The case was thereupon prosecuted to a final determination by the United States, and because the officers of the Government failed and neglected to bring into the suit by a supplemental bill the Echaveal heirs, before the statute of limitations had run, such negligence and omission upon the part of the officers of the Government in a suit which the statute commands it to institute, is now held by the circuit court of appeals to be chargeable to Donovan.

We maintain that whatever laches existed in connection with the facts in this case were the laches of the officers of the Government and not of Donovan; and that he, Donovan, has at all times been vigilant and has done everything that might reasonably be expected under the law for the purpose of asserting his rights in connection with this land. Donovan had no control over this litigation under the act of 1887. He was, in fact, one of the parties defendant to that suit, and we can not appreciate the logic which holds that after the United States had assumed full charge and control of the prosecution of this case in the performance of a governmental duty, and with the view of protecting either directly or incidentally whatever rights Donovan might have to the land, that it was necessary for Donovan to have instituted a separate and independent suit in order to prevent the statute of limitations from running against his interest and claim to this 80-acre tract.

It seems to me, therefore, that the evidence in this case clearly shows, with all due deference to the opinion of the circuit court of appeals, that it would be inequitable to apply the doctrine of laches, and that in equity and good conscience such doctrine ought not to be applied.

Let us examine for a moment the equities in the case as between Donovan and Woodwick, without regard to the application of legal principles. The circuit court of appeals in the concluding portion of its opinion said:

> It is claimed that Woodwick can not be an innocent purchaser, for the reason that he or his

> grantors never had the legal title. Whether the certification of the land in question under the facts as they appear in this case carried the legal title, or whether Woodwick can be said to be in a technical sense an innocent purchaser, we do not care to determine. He certainly occupies a position which appeals to a court of equity to such an extent as to justify this court in refusing relief after the statute of limitations at law has run.

The Government contends, of course, that neither the railroad company nor its grantees ever had the legal title to this 80-acre tract of land in section 35. This we will discuss at length under Part Three. If the railroad company never obtained title to the land in controversy—and under the facts it conclusively appears that the State of Minnesota and the railroad company were never entitled to receive a patent to this land from the Government—it is clear that the railroad company would not lose anything by having this land reconveyed to the United States, in order that Donovan might enter the same as a homestead. On March 20, 1888, the Southern Minnesota Railway Company conveyed this 80-acre tract to O. C. Erichsrud by warranty deed (Rec., pp. 171, 172) for and in consideration of $480. About a week thereafter Erichsrud died intestate, leaving certain heirs. It is clear that, if, for any reason, there was a breach or a failure of the warranty, the heirs of Erichsrud are in a position to recover from the Southern Minnesota Railway

Company. On May 24, 1899, the widow of Erichsrud and his children conveyed by warranty deed said 80-acre tract to Louis K. Woodwick, for and in consideration of $2,000 (Rec., p. 176), and Woodwick is now protected to the amount of the purchase price of the land by the warranty contained in said instrument. From this we see that Woodwick, the appellee, is protected, in the amount of money which he has expended, by his warranty in the deed of conveyance, and the Erichsrud heirs are protected in the transaction which their father had with the railroad company by the provision contained in the deed of conveyance from the railroad company to Erichsrud; and the railroad company, even though they should be compelled to return this money to the Erichsruds, is not deprived of any interest or benefit, for the reason that the railroad company never had, and was never entitled to have, any interest in the 80-acre tract erroneously certified and conveyed to the State of Minnesota for its benefit. Therefore, if the United States should prevail in this suit, and Donovan should eventually be permitted to enter the land in controversy as a homestead, none of the appellees would be injured to such an extent that they could not be put in the same position in which they were at the time they had the various transaction, which the record shows they had in connection with the purchase of this land.

On the other hand, if this decision is permitted to stand, the result will be that the railroad company secured a tract of land for which it received $480 in

cash, without ever having any legal claim or title thereto, and Donovan, the settler, who was entitled to enter the land back in 1868, and was prevented from so doing by the unlawful acts of the officers of the Government, will be deprived, not only of the absolute right which he had under the homestead laws of the United States to enter the land, but in addition thereto will be deprived of his labor upon the land, covering a period of nearly eighteen years, and the money which he expended upon the land at the time of his attempting to enter it, and during the years in which it was in his possession. If this decree of the circuit court is permitted to stand, the wrong done to Donovan can never be righted, and we earnestly maintain that the equities in this case are clearly in favor of Donovan, rather than in favor of the appellees—the Erichsruds and Woodwick.

In the foregoing discussion of the facts relative to the equities in this case we have conceded *arguendo* that the Government is merely a conduit through which one private person can conduct litigation against another private person. But even admitting that this suit is of such a character, we maintain that the circuit court of appeals committed error in holding that the equities were in favor of Woodwick, rather than in favor of Donovan, and that the suit was a proper one for the application of the doctrine of laches.

The circuit court of appeals in its opinion ignored all other questions of law and fact presented by the record, and rested its conclusion upon the principles

of law heretofore discussed. We think that we have shown that this opinion of the circuit court of appeals is erroneous, and should therefore be reversed, unless it should appear that the decision of the circuit court can be sustained upon other questions in the case which were not considered by the circuit court of appeals.

PART TWO.

Negative errors committed by the circuit court of appeals by its failure to correct the errors committed by the circuit court in its opinion and judgment.

I.

The circuit court erred in holding that the lands in the indemnity limits of the grant were withdrawn from market on September 10, 1866, and that the cancellation of Barkley's entry on January 14, 1868, did not restore the 80-acre tract in controversy to market, and subject to entry by the first legal applicant.

It is well-settled law that where a tract of land in the place or granted limits is subject to a homestead or preemption claim at the date of the grant, it is thereby forever excepted from the grant. (*Bardon* v. *Northern Pacific Railroad Co.*, 145 U. S., 535.)

It is equally well-settled law that land along the indemnity limits of a railroad grant, if subject to a homestead or preemption claim at the time of the grant, which claim is afterwards canceled, that the land then becomes subject to selection by the railroad company or any other legal applicant. (*Ryan* v. *Railroad Co.*, 99 U. S., 382; *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S., 496, 511–512; *Hewitt* v. *Schultz*, 180 U. S., 139.)

The error of the court consisted of three erroneous assumptions:

(*a*) The simple allegation in the bill "that an order was made by the Secretary of the Interior withdrawing the lands embraced within the provisions of said act from market on September 10, 1866," was not intended as an allegation extending the withdrawal to anything more than the granted or place lands, and was not intended to convey the idea that an order was issued by the Secretary of the Interior at that time withdrawing the indemnity lands from market and public sale.

(*b*) It is alleged in the bill that the withdrawal was made September 10, 1866. The answer of the defendants, the railway companies, states that the definite location of the road was made and map thereof filed December 10, 1866. (See Rec., p. 15.) Section 5 of the granting act, which must necessarily be the measure of power which the Secretary of the Interior had with respect to the withdrawal of the public lands embraced within its provisions, provides as follows:

> That as soon as the governor of said State shall file or cause to be filed with the Secretary of the Interior, maps designating the routes of said roads, then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act. (14 Stat., 87.)

It is well settled by the land department that where Congress provides for the withdrawal of lands from market, any withdrawal which is contrary to such pro-

vision is absolutely void. (*Northern Pacific Railroad Co.* v. *Davis*, 19 Land Decisions, 87.)

In Atlantic and Pacific Railroad Company (6 Land Decisions, 84), Mr. Secretary Lamar, on page 87, said:

> Were I called upon to treat as an original proposition the question as to the legal authority of the Secretary to withdraw from the operation of the settlement laws lands within the indemnity limits of said grant, I should at least have such doubts of the existence of any such authority as to have restrained me of its exercise.

It must be observed, however, in the case at bar, that the Secretary of the Interior more than three months before the line of road was definitely located, and a map thereof filed by the governor of the State of Minnesota with the Secretary of the Interior, that the Secretary of the Interior attempted to withdraw from market the lands embraced within the provisions of this act. Such action on the part of the Secretary was clearly contrary to the provisions of section 5 of the act defining his power with respect to such withdrawal, and such withdrawal was therefore absolutely void.

(*c*) And, finally, it is well settled that where land is subject to a homestead or preemption claim at the date of the passage of a granting act, that such land is excepted from an order withdrawing the lands from market.

In the case of the *St. Paul, Minneapolis and Manitoba Railway Co.* v. *Iverson* (vol. 14, Land Decisions), the

uniform rule prevailing in the Land Department is thus stated:

> Under the uniform rulings of this Department, said filing and entry, being subsisting at the dates said withdrawals became effective, served to except the land embraced therein from the operation of such withdrawals, and the same was thereafter subject to settlement and entry by any qualified person, or selection by either of the companies in the manner prescribed in the regulations governing such selections.

The Commissioner of the General Land Office, in his letter to the Secretary of the Interior, while ruling against the application of Donovan, says with reference to the effect of the withdrawal:

> There can be no question that the land was excepted from the withdrawal. Upon the cancellation of Barkley's entry the tract became subject to selection on account of the grant or to the entry under the preemption or homestead laws by the first legal applicant. (See p. 119 of Record.)

The Secretary of the Interior, in his letter to the Commissioner, referring to the same matter, says:

> The tract in dispute was excepted from the withdrawal for the benefit of said grant by reason of the entry of Barkley, and after the cancellation of his entry the tract became subject to selection by the road, or to entry under the homestead and preemption laws by the first legal applicant. (See p. 121 of Record.)

And it may be further suggested that the joint answer of the railway companies admits that the land

was subject to selection or to entry under the homestead or preemption laws of the United States by the first legal applicant, after the cancellation of the Barkley entry in February, 1868. (See p. 15 of Record.)

There is no claim, either in the pleadings or in the evidence, that the withdrawal order of the Secretary of the Interior of September 10, 1866, operated to prevent a selection by the railroad company or an entry under the homestead or preemption laws of the United States after the cancellation of the Barkley entry. And the decision of the circuit court that such withdrawal took the land out of the reach of a homesteader or preemptor is the first affirmative and manifest error committed by the court below.

Admitting, *arguendo*, not only that the withdrawal order of the Secretary of the Interior was legal, but that it also extended to lands in the indemnity limits, it is quite manifest that the homestead entry of Barkley would except that particular tract of land from the operation of such withdrawal. This assertion is based upon the ground that where a homestead or preemption claim has attached to land, such land is thereby segregated from the public domain, and for the time being is withdrawn from the jurisdiction of the Secretary of the Interior and the land department, and so continues until the entry is canceled. (Ryan case, *supra;* see also *Southern Pacific Railway Company* v. *Bell*, 183 U. S., 675.)

In the recent case of the *Oregon and California Railroad Company* v. *The United States* (189 U. S., 103, 112,

113) this court, after reviewing at considerable length prior decisions in the Federal courts with respect to the power of the Secretary of the Interior to withdraw indemnity lands from public market, made use of the following language:

> Having regard to the adjudged cases, it is to be taken as established that, unless otherwise expressly declared by Congress, no right of the railroad company attaches or can attach to specific lands within indemnity limits until there is a selection under the direction or with the approval of the Secretary.

See also *O. & C. Ry. Co.* v. *U. S.* (189 U. S., 116).

II.

The circuit court erred in refusing to hold that Donovan's application to the local land office to enter the land was, under the facts in the case, equivalent to a legal entry.

It appears from the uncontradicted testimony of Donovan (see pp. 63 to 73, and 88 and 90 of Record), that immediately upon the rejection of his application to enter the land in controversy in June, 1868, he returned to the land and took possession of that tract in section 35 along with the 80-acre tract in section 26, which he had been allowed to enter, and commenced the cultivation of the same and continued in the possession and cultivation of the same without objection or opposition down to the year 1885. In May, 1875, he appeared before the local land office and made final proof of his occupation and cultivation of the 80 acres in section 26, for which he received a

patent, and at the time of making such proof he also offered to prove to the register of the land office his occupation and cultivation of the 80-acre tract in section 35; but the register refused to take such proof upon the ground that he had not been allowed to enter the same. (Rec., p. 70.) Donovan never voluntarily abandoned the land.

From these facts we conclude that Donovan, having performed all the requirements of law with respect to the occupation and cultivation of the land in controversy, so as to entitle him to a certification and patent for the same, he secured a vested interest in the land of which he could not be deprived even by an act of Congress.

It is well settled by repeated decisions that where a party applies to enter, under the homestead or preemption laws of the United States, a tract of land which is subject to be so taken, and he is qualified to thus acquire the same, and his application is erroneously rejected by the Government officials, his right thereto attaches just the same as though his application had been allowed; and if he continues in possession and complies with the law so as to be entitled to a patent, he acquires a vested interest of which he can not be deprived even by an act of Congress.

Shepley v. Cowan (91 U. S., 330).

This was a suit to settle conflicting claims of the parties, arising from their respective patents to a fractional section of land, comprising thirty-seven and two-fifths acres, situated in the State of Missouri.

The court says:

> His right thus initiated could not be prejudiced by the refusal of the local officers to receive his proofs upon the declaration that the land was then reserved, if, in point of fact, the reservation had then ceased.

Ard v. Brandon and Ard v. Price (156 U. S., 537).

In this case Ard applied to enter as a homestead 240 acres of land, 80 acres of which was in section 2 and 80 acres in section 11, but each adjoining tracts, and could thus be taken as a homestead under sections 2289 and 2290 of the Revised Statutes. It will be observed that this was exactly the situation of Donovan in the case at bar. Ard's application was for land in the State of Kansas, and was rejected upon the ground that the land was within the limits of two railroad grants, one to the Missouri, Kansas and Texas Railway Company and the other to the Leavenworth, Lawrence and Galveston Railroad Company. Ard was told by the local land officers that the minimum price of the land was $2.50 per acre, and that he could preempt 80 acres at the minimum price and afterwards acquire the other 80 acres under the homestead law as an adjoining tract, and advised him to get title in that way, and he accordingly changed his application from a homestead into a preemption filing on the 80-acre tract in section 2. These lands were within the indemnity limits of the grants to the railroad companies, and it appears that indemnity lands could be selected in even as well as in odd

sections. Ard applied to make final proof upon said land in 1872, but his application was rejected upon the ground that all the land belonged to the railroad company. The tract in section 2 had been selected by the Missouri, Kansas and Texas Railway Company in 1870, and patented to that company the same year, and the tract in section 13 had been selected by both companies in 1867 and certified to the State for the Missouri, Kansas and Texas Railway Company in 1873. The defendants, Brandon and Dyer, each claimed title to one of the 80-acre tracts under conveyances from the railroad company, and brought separate actions of ejectment against Ard to recover the possession of the same in the State court, whose judgment was confirmed in their favor against Ard, and the case removed by him to the Supreme Court.

The syllabus of the case is as follows:

> A, being qualified to make a homestead entry, entered in good faith upon public land within the indemnity limits of a railroad grant, but not within the place limits. He forwarded at the local land office the right to enter 160 acres as a homestead. This was refused on the ground that the tract was within the limits of the grant, although at that time the land had not been withdrawn from entry and settlement. This was subsequently done, and the land conveyed to the railway company. A remained upon the land, cultivating it. In an action to recover possession from him, brought here from a State court by writ of error, *held* that the application was wrongfully rejected, and that

his rights under it were not affected by the fact that he took no appeal.

The opinion of the court was delivered by Justice Brewer, and after some preliminary remarks, he says (we put in italics what we wish to call special attention to):

> The question, therefore, is whether the cases disclose equitable rights in the defendant superior to the claims of the railway company. If his rights are only those which spring from his preemption entry and subsequent occupation of the lands, it may well be, as held by the supreme court of the State, that the decisions of the land department upon the question of fact are conclusive against him. But we are of the opinion that the testimony shows a right anterior to his preemption entry—a right of which he was deprived by the wrongful acts of the local land officer, and which he did not forfeit or lose by virtue of his subsequent efforts to preempt the land. According to this testimony he had commenced improving the premises prior to July 14, 1866. He was qualified under the laws of the United States to make a homestead entry. The land was not within the place limits of either road, and had not been withdrawn by the land department from entry and settlement, for the orders of withdrawal were not made until March 19 and April 30, 1867. He had, therefore, on July 14, when he went to the land office, the right to enter the entire 160 acres as a homestead. This right he demanded. He made out a homestead application for the land as described, tendered the application and the

> land-office fees to the register of the land office, but the register rejected the application, giving as a reason therefor that the land was within the granted limits of the Leavenworth, Lawrence and Galveston Railroad, and was double minimum lands, and that 80 acres was the limit of a homestead entry of such lands. As to this matter of fact the register was mistaken, and his rejection of the application was wrongful, and denied to defendant that homestead entry which, under the law, he was then entitled to. In the case of *Shepley* v. *Cowan* (91 U. S., 330, 338), this court said, after referring to the cases of *Frisbie* v. *Whitney* (9 Wall., 187), and the *Yosemite Valley Case* (15 Wall., 77).

After quoting from the case of *Shepley* v. *Cowan*, the court further proceeds as follows:

> Within the authority of that case we think the defendant has shown an equity prior to all claims of the railway company. He had a right to enter the land as a homestead; he pursued the course of procedure prescribed by the statute; he made out a formal application for the entry, and tendered the requisite fees, and the application and the fees were rejected by the officer charged with the duty of receiving them—and wrongfully rejected by him. ***Such wrongful rejection did not operate to deprive defendant of his equitable rights, nor did he forfeit or lose those rights because, after this wrongful rejection, he followed the advice of the register and sought in another way to acquire title to the lands. The law deals tenderly with one who, in good faith goes upon the public lands, with a view of making***

a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application.

The policy of the Federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person. (*Clements* v. *Warner*, 24 How., 394, 397.)

In regard to the fact that Ard did not appeal from the refusal of the local land officers to allow his homestead entry, the court says:

Doubtless the error could have been corrected by an appeal, and perhaps that would have been the better way; but when, instead of pursuing that remedy, he is persuaded by the local land officer that he can accomplish that which he desires in another way—a way that to him seems simpler and easier—it would be putting too much of rigor and technicality into a remedial and beneficial statute like the homestead law to hold that the equitable rights which he had acquired by his application were absolutely lost.

The decision of the State court was reversed and the land given to Ard.

This case has been referred to and approved in several subsequent decisions, and is a recognized leading

authority to the point that where an application to enter or preempt land which is subject to be so taken, by a party duly qualified, is erroneously rejected, the rights of the applicant attach and become fixed just as effectually as if the application had been allowed.

Weeks v. Bridgman (159 U. S., 541).

This is a case where a man by the name of Brott applied to enter a section of land under the preemption laws, which in point of fact he had a right to so enter, but the local land officers rejected his application upon the ground that the land belonged to a railroad grant for the railroad from St. Anthony to St. Cloud. Brott appealed to the Land Commissioner and to the Secretary of the Interior, which latter officer decided in favor of his right to preempt the land. In considering the question as to the effect of his application to preempt and its rejection, the court says:

> The line of the road was definitely fixed December 30, 1857; the lands within the place limits then subject to the grant were thereby segregated from the public domain; and the grant took effect thereon. But under the granting act, lands to which preemption rights had attached, when the line was definitely fixed, were as much excepted therefrom as if in a deed they had been excluded by the terms of the conveyance. *And this was true in respect of applications for preemption rejected by the local land office* and pending on appeal in the land department at the time of definite location, since the

initiation of the inchoate right to the land would prevent the passage of title by the grant, and the determination of its final destination would rest with the Government and the claimant. (*Railway Company* v. *Dunmeyer*, 113 U. S., 629; *Railroad Company* v. *Whitney*, 132 U. S., 357; *Bardon* v. *Railroad Company*, 145 U. S., 535; *Ard* v. *Brandon*, 156 U. S., 537; *Whitney* v. *Taylor*, 158 U. S., 85.) Brott selected certain lands, including this in dispute, for and built and established his mail stations thereon in 1855 and maintained the same during the term of his mail contract, and filed his application to enter these lands as a mail contractor under the act of March 3, 1855, in the local land office August 11, 1857. The application was rejected by the local land officers, and Brott appealed to the Commissioner of the General Land Office, and from his decision to the Secretary of the Interior, who reversed the rulings of the land officers and of the Commissioner, and held Brott entitled to preempt the stations occupied. *He was, indeed, required to produce proof of the performance of his mail contract and of the occupation of the lands as stations*, and he actually entered them in pursuance of the act of Congress for his relief, *but in Ard* v. *Brandon, supra, it was held that when a preemptor has the right to make entry and applies to the local land officers and they refuse to recognize his right, it will be deemed to date from the time of his application, and this notwithstanding he proceeds to obtain title in some other way.* The conclusion follows that Brott's preemption claim must be regarded as having

attached prior to the definite location, December 30, 1857, and that the title did not pass under the Congressional grant to the State.

But Brott did not pursue his preemption application or acquire title under the same, but procured an act of Congress authorizing him to preempt the same, and that he did, and obtained a patent in 1871. In the meantime, however, the land had been certified to the State as appertaining to the railroad grant and had been conveyed by the State to the railroad company. Therefore Brott could not claim title as against the railroad company under the act of Congress giving him the right to preempt the same, as that was subsequent to the date when the rights of the railroad company would attach, unless his application to preempt excepted the land from the operations of the grant. The court held that it did, and therefore that the certification of the land to the State and the conveyance by the State to the railroad company passed no title as against the rights of Brott, and that although Brott did not get a patent under his preemption application, yet having obtained the patent in fact, although subsequent to the conveyance of the land to the railroad company, it gave Brott the better title. The defendant in the action claimed title under Brott and the plaintiff in the action claimed title under the railroad company. *The case affirms the doctrine* that *an application to enter or preempt land, if erroneously rejected, secures to the applicant the same rights as if allowed.*

That was a case where a man by the name of Olney had settled upon a tract of land in Utah with the view of acquiring title under the land laws of the United States in 1868, but at that time there was no local land office where he could file his application, but in 1869, and soon after such an office was established, filed his preemption application and dated the same at the date of such filing instead of the date of his settlement upon the land, and made no reference to the fact of his settlement upon the land prior to the date of such filing. But before the date of said filing the Central Pacific Railroad Company had located the line of its road through that region and the Olney land fell within the limits of a grant by Congress for that road. The date of Olney's actual filing was therefore subsequent to the date when the rights of the company would attach by the location of its road. Olney, however, abandoned his claim, and the land was conveyed to the railroad company under the grant. Many years thereafter another party settled upon and filed a preemption claim to the land, claiming that the land was excepted from the grant by virtue of the settlement of Olney upon it before the location of the road, and his application was allowed, under which he finally obtained a patent. The land was also patented to the railroad company. The supreme court of Utah decided in favor of the party holding under the preemption claim, but this court reversed that decision, holding that the record showed

the Olney entry to be subsequent to the location of the road and that oral evidence was not admissible to show an earlier entry by Olney upon the land. In considering the effect of an entry upon land without actual filing in the land office, the court say:

> It is true that there was then no local land office in which those seeking to make preemption or homestead entries could file their declaratory statements or make entries, and the want of such an office is made by the supreme court of the State one of the main grounds for holding that the land did not pass to the railroad company. We agree with that court fully in its discussion of the general principles involved in the failure of the Government to provide a local land office. The right of one who has actually occupied, with an intent to make a homestead or preemption entry, can not be defeated by the mere lack of a place in which to make a record of his intent.
>
> Where the accident or omission is not the fault of the party, but of the Government or some official of the Government, such accident or omission can not defeat the right of the individual, and in all that is said in respect to this by the supreme court of the State of Utah we fully agree.
>
> And in this respect we must notice the oft-repeated declaration of this court that "the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon." (*Ard* v. *Brandon*, 156 U. S., 537, 543; *Northern Pacific Railroad* v. *Amacker*, 175 U. S., 564, 567.) With this declaration in

all its fullness we heartily concur, and have no desire to limit it in any respect, and if Olney, the original entryman, was pressing his claims, every intendment should be in his favor in order to perfect the title which he was seeking to acquire.

Goodale v. Olney (12 Land Decisions, 324).

It is also the well-settled rule of the *land department* that an application to enter or preempt land which is erroneously rejected secures to the applicant the same rights as if his application had been allowed.

The Secretary of the Interior, in *Goodale* v. *Olney*, held that:

> An application to enter is equivalent to an actual entry, so far as the rights of the applicant are concerned, and while pending reserves the land from any other disposition. An applicant for the right of entry is not required to reside on the land embraced within his application pending the decision thereon. (See also *Duluth and Iron Range R. R. Co.* v. *Roy*, 173 U. S., 587.)

And in *Coder* v. *Lotridge* (p. 643), same volume, the Secretary also held in the same words that:

> An application to enter is equivalent to an actual entry, so far as the rights of the applicant are concerned, and while pending reserves the land from any other disposition.

III.

As Donovan had complied with all the requirements of the law, including payment for the land, to entitle him to a certificate and patent for the same, he thereby acquired a vested interest in the land of which he could not be deprived by any act of Congress.

Now, while it is the settled rule of law that a mere homestead entry or preemption filing does not secure to the party any rights as against the power of the United States to make other disposition of the same, yet it is equally well settled that where the party has fully complied with the law so as to become entitled to a certificate of entry and a patent for the land, *he thereby acquires a vested interest* in the land, of which he can not be deprived by Congress or otherwise without his consent. Thus in the case of *Gonzales* v. *French*, (164 U. S., 338, 346), the Supreme Court, after stating the rule that a mere preemption filing or homestead entry does not give to the party a vested right in the land as against the power of the United States to make other disposition of it, says:

> That the power of regulation and disposition conferred upon Congress by the Constitution only ceased when all *the preliminary* acts prescribed by law for the acquisition of the title, including the payment of the price of the land, had been performed by the settler. *When these prerequisites were complied with, the settler for the first time acquired a vested right in the premises of which he could not be subsequently deprived.* He was then entitled to a certificate of entry

> from the local land officers, and ultimately to a patent of the United States.

Donovan had performed all the preliminary acts required by law, including payment for the land, for the acquisition of the title. On compliance with these preliminary acts he for the first time acquired a vested right in the premises of which he could not be subsequently deprived. He was then entitled to a certificate of entry from the local land officers and ultimately to a patent of the United States.

It is well settled that where a party has paid for the land and has complied with the law for the acquisition of the same he thereby becomes the absolute owner, and may deal with the same as his own, and the same is subject to taxation, although he may not have received his patent therefor. In such case the Government merely holds the legal title in trust for him. (*Carroll* v. *Safford*, 3 How., 441; *Astrom* v. *Hammond*, 3 McLean, 108; *Carroll* v. *Perry*, 4 McLean, 26; *Ross* v. *Supervisors, etc.*, 12 Wis., 38; *People* v. *Shearer*, 30 Cal., 645.)

Newkirk v. Marshall, Kas. (vol. 10, Pacific Rep., 571).

In that case it was held that a homestead entryman who had occupied and cultivated the land as required by law for five years acquired a *vested interest in the same*. Upon this subject the court says:

> Under the facts of this case we do not think that the plaintiff can maintain her action. Under the United States homestead laws, and by

a compliance with them, a person entering a homestead, or in case of his death his widow, or in case of the death of both his heirs or devisee, *obtains a vested right in the homestead at the expiration of five years from the entry thereof*, and upon making proper proof is entitled to a patent for the land from the United States. And as soon as a person is entitled to a patent, although it may not yet have been issued, and may not be issued for years, he or she may contract and be contracted with concerning the land, or sell it, or convey the same, precisely the same as though the patent had already been issued. Equity, in order to do justice and to protect the rights of parties and to prevent frauds, will generally consider that as having been done which ought to be done. And in order to protect the rights of all parties where a patent is due, but has not yet been issued, equity will consider such rights precisely the same as though the patent had in fact been issued on the very first day on which it ought to have been issued.

That an entryman acquires a vested interest in the land when he has fully complied with the requirements of the law was recognized in the case of *Hawley* v. *Diller* (178 U. S., 476), where the court, on page 490, after a lengthy review of the authorities, concludes as follows:

> We are of opinion that the result of the decisions of this court was correctly stated by Judge Hawley when, speaking for the United States circuit court of appeals in *American Mortgage Co.* v. *Hopper* (29 U. S. App., 12, 17), he

said: (1) That the land department of the Government has the power and authority to cancel and annul an entry of public land when its officers are convinced, upon a proper showing, that the same was fraudulently made; (2) *that an entryman upon the public lands only secures a vested interest in the land when he has lawfully entered upon and applied for the same, and in all respects complied with the requirements of the law;* (3) that the land department has control over the disposition of the public lands until a patent has been issued therefor and accepted by the patentee, and (4) that redress can always be had in the courts where the officers of the land department have withheld from a preemptioner his rights, where they have misconstrued the law, or where any fraud or deception has been practiced which affected their judgment and decision.

Now, Donovan duly applied to enter the land in June, 1868, in connection with an adjoining 80-acre tract in section 26, and paid the price thereof, but his application to enter the tract in question in section 35 was erroneously rejected. He, however, continued to occupy, cultivate, and improve the tract of land in question for five years without opposition, and in 1875, after having so occupied and cultivated the same for five years, and having fully complied with the law in that respect, at the time of making final proof in respect to the 80-acre tract in section 26, he also offered proof of his occupation and cultivation of the tract of land in question, as required by law, but such proof was re-

jected and refused to be taken by the local land officers upon the ground that he had not been allowed to enter said tract. He, therefore, had done everything that the law required of him to do in order to acquire a title under the homestead laws to said tract of land in question. *He had duly applied to enter it and had paid the price of the land at that time, and had occupied and cultivated it for five years, and offered to make final proof, as required by law. He, therefore, then became entitled to a certificate of entry and to a patent to the land. He had acquired a vested interest in the land of which he could not be deprived.*

PART THREE.

THE PRECISE QUESTION OF LAW UPON WHICH THIS CASE MUST BE DECIDED.

In the first part of our argument we have endeavored to show that the circuit court of appeals based its decision in this case upon principles of law which had no application to the facts here presented, and as a necessary result the reasons which that court assigned for its decision are unsound. In the next place we have endeavored to point out certain errors committed by the circuit court with a view to showing that the reasons assigned by that court for its decision are based upon erroneous conceptions of the law. We will now endeavor to indicate what we conceive to be the vital and pivotal point at issue in this case, and the solution of which must determine the respective rights of the parties to this controversy.

THE PRECISE QUESTION OF LAW PRESENTED.

If the United States had the legal title to this land in 1871 when it certified the same to the State of Minnesota, and at the same time had also jurisdiction to convey such legal title to the State, and thereafter Louis K. Woodwick acquired such legal title as a bona fide purchaser, (which would be, of course, without notice, actual or constructive, of Donovan's equities and interest in the land), then, and in such case, neither the United States nor Donovan could recover the land, for the reason that the law protects the bona fide purchaser.

It will be observed that this proposition concedes two points, neither of which the Government is pre-

pared to concede. In the first place the United States must have occupied such a position with respect to the title to this land in 1871, that its officers in the Interior Department had jurisdiction to convey *the legal title.* If Donovan's settlement upon the land, and having cultivated it for three years prior to 1871 with the intention of claiming it under the homestead laws of the United States, operated to divest the Interior Department of jurisdiction to certify such land to the railroad company, then of course the legal title never passed to the railroad company, although they received a patent, which was, as this court has so often said, merely evidence of the legal title. But even though the legal title passed by the certification, Donovan still held the equitable title by reason of his occupancy and cultivation of the land, and he retained such title as against the railroad company and all other parties purchasing from the railroad company or its grantees with knowledge, actual or constructive, of Donovan's equitable right to the land. In other words, in order to divest Donovan of his claim to the equitable title to the land, and of the Government of its right to cancel the patent, it was necessary for some third party to acquire from the railroad company the legal title for a valuable consideration, in good faith and without notice, of Donovan's equities.

Manifestly, nobody could acquire such title while Donovan was in possession, for possession itself was notice to the purchaser. When Thompson dispossessed Donovan in 1885, and went into possession and conducted the litigation which lasted until 1888, both the

United States and Donovan were in a position to assert their rights with respect to this land as against the railroad company and as against Thompson, for the reason that each had notice of Donovan's claim and of his equities in the land.

If it should be determined that the legal title to this land passed to the State of Minnesota in 1871, the next important question for determination is whether Louis K. Woodwick, the present holder, purchased the property from the Erichsrud heirs without notice, either actual or constructive, of the pendency of the suit between the United States and the railroad company involving the question of title to this land. If Woodwick bought the land as a *bona fide* purchaser in 1899, and acquired the legal title to the same, it must be conceded that at that precise time not only was the right of the United States to recover the land defeated, but Mr. Donovan was precluded from thereafter asserting his claim to the land as against such *bona fide* purchaser.

It will, therefore, be seen that, without any reference to the act of March 3, 1887, or the act of March 2, 1896, the rights of the several parties to this controversy were finally settled and determined at the time of the Woodwick purchase in 1899.

The Government, therefore, in order to prevail in this suit, must establish either one of two propositions: *First*, that the legal title to the land never passed to the railroad company from the Government by the certification in 1871; or, *second*, that Louis K. Woodwick was not a *bona fide* purchaser of the land in 1899,

and took his title with notice of Donovan's claim and the other irregularities in connection with the certification to the railroad company. It is manifest that if either one of these two propositions be established, the Government or Donovan would be entitled to maintain a suit for the recovery of this land against Woodwick, for the reason that he either never acquired the legal title to the land or had notice of Donovan's claim.

(a)

Did the administrative officers of the Interior Department have the power in 1871 to convey by certification to the railroad company the legal title to the land in controversy?

This question suggests to the mind two matters for investigation: First, did the United States Government have the legal title to this 80-acre tract of land, so that its officers could convey title, after Donovan had resided upon it and cultivated it, with the intention of claiming it as his homestead, for a period of more than three years? That is to say, had not a qualified or initiatory title passed from the United States to Donovan, so as to prevent the ministerial officers of the Government from passing title to some one else, and so as to render their attempted acts in that regard absolutely void? Second, if the United States in 1871 still retained title in itself, notwithstanding Donovan's occupation and cultivation of the land, did not such occupation and cultivation withdraw the land from the jurisdiction of the Land Department, so far as issuing a certification was concerned to the railroad company,

just as effectually as though the land had been reserved or otherwise appropriated specifically by an act of Congress?

The solution of these two questions will determine whether or not the railroad company obtained the legal title to the land in 1871 by and through the certification to the State of Minnesota, and if so, then, and in such case, the railroad company could, of course, convey the legal title to a purchaser, and the remaining question would be as to whether such purchaser bought with notice of the defects in the company's title.

Donovan's entry and occupation of the lands in controversy and cultivation of the same up to 1871, with the purpose of entering the same as his homestead had the legal effect of so withdrawing such lands from the control of the Land Department that the officers thereof had no authority to issue a certification to the State of Minnesota, and their acts in so doing with respect to this tract of land were void.

Doolan v. Carr (125 U. S., 618, 624).

Mr. Justice Miller, in delivering the opinion of the court in this case, clearly pointed out when the acts of the officers of the Government in issuing patents were void and when merely voidable. He said:

> There is no question as to the principle that where the officers of the Government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law, as distinguished from

suits in equity, subject, however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority, if the land which they purported to convey had never been within their control or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void—void for want of power in them to act on the subject-matter of the patent, not merely voidable; in which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction, established by law, and it has often been asserted in this court, that even a patent from the Government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue.

The decisions of this court on this subject are so full and decisive that a reference to a few of them is all that is necessary. *Polk's Lessee* v. *Wendall*, 9 Cranch, 87; *New Orleans* v. *United States*, 10 Pet., 662, 730; *Wilcox* v. *Jackson, dem. McConnell*, 13 Pet., 498, 509; *Stoddard* v. *Chambers*, 2 How., 284, 317; *Easton* v. *Salisbury*, 21 How., 426, 428; *Reichart* v. *Felps*, 6 Wall., 160; *Best* v. *Polk*, 18 Wall., 112, 117; *Leavenworth*

Railroad v. *United States*, 92 U. S., 733; *Newhall* v. *Sanger*, 92 U. S., 761; *Sherman* v. *Buick*, 93 U. S., 209; *Smelting Co.* v. *Kemp*, 104 U. S., 636; *Steel* v. *Smelting Co.*, 106 U. S., 447; *Kansas Pacific Railway Co.* v. *Dunmeyer*, 113 U. S., 629, 642; *Reynolds* v. *Iron Silver Mining Co.*, 116 U. S., 687.

From the foregoing case it is apparent that in those cases where the United States parts with the legal title to land, or where the land has been reserved or otherwise appropriated by Congress, the officers of the land department have no longer any jurisdiction with reference to the subject-matter, and if thereafter they should attempt to issue a patent or certification for any such lands, their acts would be absolute nullities.

The precise question here is whether Donovan's occupation, improvement, and cultivation of this 80-acre tract in section 35 for a period of three years, and his application to enter the same at the local land office as his homestead, operated to withdraw this tract of land from the control of the Secretary of the Interior, so that he was without jurisdiction to issue a certification covering the same to the railroad company in the year 1871.

It has been decided frequently by this court that a patent is but evidence of a grant, and that the officer who issues the same acts ministerially and not judicially. (*United States* v. *Stone*, 69 U. S., 525; *Hawley* v. *Diller*, 178 U. S., 476; *Newkirk* v. *Marshall*, 10 Pacific Rep., 571.)

It has also been decided by this court that under

the Federal laws relating to homesteads, when a person qualified to make a homestead entry goes upon the public domain in good faith, with the purpose of settling thereon and acquiring a homestead under the laws of the United States, his right to the lands so entered attaches as at the time of his settlement, and that such right from that time gradually, day by day, ripens into a perfect title, so that at the end of five years, if he has fully complied with the laws of Congress relative to occupation and cultivation, he becomes invested with the absolute title to the land, although no patent may have issued to him, and a patent or evidence of his title may not be issued to him by the officers of the Government for many years thereafter.

This being true, the question naturally presents itself as to the time when the title to the land passes from the United States to the homesteader. To illustrate: Suppose that the certification to the railroad company in this case had not been made until 1876, after Donovan had been in possession of the land and cultivated the same for a period of more than five years, would it not be clear that Donovan had acquired not only a vested interest in the land, but that the title to the land, both legal and equitable, had passed from the United States to Donovan after he had been on the land for a period of five years? It would be true that the patent, which is the evidence of title, would still be unissued, and might be thereafter issued by the ministerial officers of the Government to the railroad company or some other party not

entitled to the same; but such issuance of the evidence of title would have no effect to convey even the legal title to such patentee. We therefore submit that, upon the settlement and occupation of the land by Donovan, with the purpose of acquiring the same as a homestead, not only was the title of the United States to said land so impaired as to prevent the United States from conveying the legal title thereto to the railroad company, but that such lands were also withdrawn from the jurisdiction of the Land Department as to prevent its officers from conveying the legal title thereto, and that their ministerial acts in issuing the patent or certification to the railroad company were absolutely void.

Burr v. Greeley (52 Fed. Rep., 926).

In considering this matter the circuit court of appeals for the eighth circuit, in *Burr* v. *Greeley*, speaking through Judge Caldwell, said:

> In the case of *Railway Company* v. *Dunmeyer* (113 U.S., 629) 5 Sup. Ct. Rep. 566, the Supreme Court decided that under the act of July 1, 1862, and the acts amendatory thereof, granting lands to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean (12 Stat., 489), lands to which a preemption or homestead claim had attached at any time before the line of the road was definitely fixed by filing a map of its location with the Commissioner of the General Land Office at Washington were exempted from the operation

of the grant, and that the failure of the preemptor or homesteader to make the requisite proof and perfect his claim, or its actual abandonment, did not cause the lands to revert to the railway company or become a part of the grant, but in such case it remained a part of the public domain. Before this decision was pronounced the Government had issued patents or patent certificates to the railway company for lands which were not within the grant, because preemption and homestead rights had attached thereto before the company filed the map of the definite location of its road in the General Land Office. In some instances the company had sold and conveyed such lands.

After the decision in the Dunmeyer case it was plain that as to all lands to which the right of premption or homestead had attached prior to the definite location of the line of railroad the patents issued by the Government to the railway company were void. (*Railway Company* v. *Dunmeyer, supra; Smelting Company* v. *Kemp*, 104 U. S., 646, 647; *Steel* v. *Refining Company*, 106 U. S., 452, 453; *Wilcox* v. *Jackson*, 13 Pet., 498; *Best* v. *Polk*, 18 Wall., 112; *Doolan* v. *Carr*, 125 U. S., 618.) It was equally plain that the purchasers from the railway company of such lands acquired no title.

Weeks v. Bridgman (159 U. S., 541).

In this case a man by the name of Brott had applied to preempt a tract of land, but his application was erroneously rejected upon the ground that the land belonged to a railroad grant, and the land was afterwards conveyed

to the railroad company as a part of its grant, and by the company sold to a *bona fide* purchaser. Brott long afterwards obtained a patent for the land under a special act of Congress and conveyed the land to another party. A question arose as to who had the better title, the party claiming under the railroad company or the party claiming under Brott. It was held that the party claiming under Brott had a better title because Brott's title was initiated at the time of his application to enter, and that the conveyance to the railroad company was void and passed no title. On page 517 the court said:

> As we have seen, this particular land was not included in the grant, and the Secretary of the Interior had so decided on August 30, 1861, when he determined that the preemption right had attached. And since it was not so included nor subject to disposition as part of the public domain, on October 25, 1864, the action of the land department in including it within the lists certified on that day was ineffectual. (*Noble* v. *Railroad Co.*, 147 U. S., 165, 174.)

Gertgens v. O'Connor (191 U. S., 237).

The Supreme Court in rendering its decision in this case said:

> There were three parties whose interests and equities were to be regarded: First, the railway company, the beneficiary of the grant; second, parties who had dealt with the railway company in reference to lands claimed by it to be within the scope of its grant; and, third, parties who had attempted to secure title under the settlement laws of the United States.

The court, after stating the purposes of Congress with reference to the railroad company and the rights of all *bona fide* purchasers from the railroad company under the act of 1887, further states:

> The third party is the settler under the land laws, and we pass to consider his status and rights. A settler is, as has often been said, favored in law, but it does not follow therefrom that he is the only one whose equities are to be considered. Congress, by section 5, made provision for his protection—such provision as it deemed sufficient. While it gave to purchasers from the railway company a preferential right of purchase, it excepted therefrom lands which at the times of such purchase "were in the *bona fide* occupation of adverse claimants under the preemption or homestead laws of the United States and whose claims and occupation have not since been voluntarily abandoned." In other words, it said that no purchaser from the railway company should have a preferential right of purchasing any lands which at the time of his dealings with the railway company were in the hands of a *bona fide* settler under the laws of the United States, unless such settler should voluntarily abandon his settlement. As between a purchaser from the railway company and a settler on the lands, the settler was given the prior right. But the defendant was not a settler at the time of Ireland's contract, nor, indeed, until many years thereafter.

Upon the authority of the foregoing cases we assert that none of the defendants in the case at bar can base

any valid claim to the land in controversy upon the ground of their being bona fide purchasers, for the reason that they never acquired the legal title to the land. The land was clearly excepted from the grant and thereby taken out of the jurisdiction of the Secretary of the Interior. So far as the right of the Secretary to convey to the railroad company was concerned, and his certification of the land as a part of the grant, was without authority and absolutely void and conveyed no title, and of course no one claiming under the certification could or did acquire any title.

(b)

Was Louis K. Woodwick a bona fide purchaser? If so, neither the Government nor Donovan could maintain a suit to dispossess him, and this would be true, even in the absence of the acts of Congress of 1887 and 1896.

United States v. Winona and St. Peter Railroad Co. (165 U. S., 463, 478).

In this case the court clearly recognizes that a *bona fide* purchaser is fully protected in a suit against the Government, even in the absence of a statute. The court said:

> Further, there was no need of any legislation to protect a "bona fide purchaser." This had been settled by repeated decisions of this court. *United States* v. *Burlington and Missouri River Railroad Company*, 98 U. S., 334, 342; *Colorado Coal Company* v. *United States*, 123 U. S., 307, 313—reaffirmed in *United States* v. *California, &c., Land Company*, 148 U. S., 31, 41. For

in each of those cases it was decided that, although a patent was fraudulently and wrongfully obtained from the Government, if the land conveyed was within the jurisdiction of the land department, the title of a bona fide purchaser from the patentee could not be disturbed by the Goverment, so that this provision was absolutely unnecessary if that which is now claimed by counsel for the Government is all that was intended by Congress.

Colorado Coal and Iron Co. v. United States (123 U. S., 307, 313).

Mr. Justice Matthews, after stating the facts, in delivering the opinion of the court, said:

> It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands, as falsely set out in the affidavits in support of the preemption claims and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States sufficient in equity *as against the parties perpetrating it, or those claiming under them with notice of it*, to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone, the defense of a bona fide purchaser for value without notice is perfect.

On the authority of these two cases it must be conceded by the Government that if Louis K. Woodwick was a *bona fide* purchaser the decree of the circuit

court was for the right party, although the reasons assigned by the court in support of such decree may have been unsound. If this court should hold that the legal title to this land passed by the certification to the State, then the issue as to whether Woodwick was a *bona fide* purchaser in its final analysis comes down to this question, and this alone;—Was the pendency of the suit involving the title to this land sufficient to charge Woodwick with constructive notice of the defective title which he purchased?

Chancellor Kent, in the leading case of *Murray* v. *Ballou* (1st Johns., 565, decided in 1815), announced the rule of law which had been recognized in England for more than two hundred years as to when a purchaser of land is chargeable with constructive notice so as to render his purchase subject to the event of the suit. The rule is as follows:

> The established rule is, that a *lis pendens*, duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpœna after the bill is filed.

This rule is supported by ample authority both in England and America, and there seems to be no deviation from that portion of the rule which holds that the *lis pendens* begins to run from the service of the subpœna after the bill is filed.

The record in this case shows conclusively that no subpœna was served upon O. C. Erichsrud, or any of his heirs, nor upon Louis K. Woodwick, until 1901, some two years after he purchased this property from

the Erichsrud heirs. With these facts of record, it is futile to maintain that Louis K. Woodwick had constructive notice of the defects in his title by reason of the pendency of the suit which had been instituted by the Government in 1893, and in which the railroad companies alone had been served with process.

IN CONCLUSION.

We have earnestly maintained in the argument of this case that the acts of Congress of 1887 and 1896 have no direct bearing upon the real question of law here presented and upon which this case turns. In order, however, to avoid confusion and misunderstanding as to just what is meant by a *bona fide* purchaser, it becomes necessary to point out that a *bona fide* purchaser from the railroad company in the case at bar, where the prior interest of a homesteader must be considered, is very different from the *bona fide* purchaser referred to in the act of Congress of 1896, as that law has been interpreted and construed by this court.

United States v. Winona and St. Peter R. R. Co. (165 U. S., 463, 481).

In this case it must be remembered that all homestead entries and preemption filings had been duly canceled by the General Land Office, after proper notice by publication—generally on the ground of abandonment—prior to the certification of the lands to the State of Minnesota for the benefit of the railroad company. This court, therefore, with this point in view, viz, that it was a matter between the United

States, the railroad company, and the purchaser in good faith from the railroad company, the rights of homesteaders and preemptors having been eliminated, adopted a liberal construction of the phrase "bona fide purchaser" as used in the act of Congress of 1896.

The court said:

> These being the provisions of the act of 1887, the act of 1896, confirming the right and title of a *bona fide* purchaser, and providing that the patent to his lands should not be vacated or annulled, must be held to include one who, *if not in the fullest sense a "bona fide purchaser,"* has nevertheless purchased in good faith from the railroad company.
>
> * * * * *
>
> Our conclusion is that these acts operate to confirm the title to every purchaser from a railroad company of lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the Land Department, and notwithstanding the fact that the lands so certified or patented were, by the true construction of the land grants, although within the limits of the grants, excepted from their operation, providing that he purchased in good faith, paid value for the lands, and providing, also, that the lands were public lands in the statutory sense of the term, *and free from individual or other claims.*

In the case at bar, however, if Donovan had a vested interest in the land, the act of Congress of 1896 would be ineffectual, as we have seen, to confirm title of a *bona fide* purchaser from the railroad company, unless

such purchaser was "in the fullest sense a *bona fide* purchaser," in which case such a law would have been unnecessary, for the reason, as we have heretofore shown by the decisions of this court, that a *bona fide* purchaser "in the fullest sense of that term" is protected in his property rights without the aid of an act of Congress.

We assert, therefore, that it will not be sufficient for this court to say that if Louis K. Woodwick was a *bona fide* purchaser from the railroad company, as that phrase has been defined by this court in the case of the *United States* v. *Winona and St. Peter Railroad Company* (*supra*), then, under the law of 1896, his title must stand confirmed. The law of 1896 relative to *bona fide* purchasers has no application to a case such as we are here considering, and the liberal definition of a *bona fide* purchaser, which has been given by this court in the interpretation of that statute, must necessarily be disregarded and the strict legal definition of a "bona fide" purchaser adopted when we consider those cases wherein the prior rights of homestead settlers have attached.

In the recent case of *Gertgens* v. *O'Connor* (191 U. S., 237, 246) Mr. Justice Brewer, in delivering the opinion, had the following to say with reference to the prior rights of the settlers, as between the railroad company and a purchaser from the railroad company:

> In other words, it (section 5 of the act of 1887) said that no purchaser from the railway company should have a preferential right of purchasing any lands which at the time of his

dealings with the railway company were in the hands of a *bona fide* settler under the laws of the United States, unless such settler should voluntarily abandon his settlement. As between a purchaser from the railway company and a settler on the lands, the settler was given the prior right. But the defendant was not a settler at the time of Ireland's contract, nor, indeed, until many years thereafter.

Respectfully submitted.

MILTON D. PURDY,
Assistant Attorney-General.

APPENDIX.

THE FACTS IN THE CASE ARRANGED IN THEIR CHRONOLOGICAL ORDER.

1866, June 21.—Luman Barkley duly entered the E. ½, N. W. ¼, sec. 35, T. 101, R. 28 W. as a homestead. (Rec., p. 118.)

1866, July 4.—Congress made a grant of land to the State of Minnesota to aid in the construction of a railroad in the southern part of the State. (Rec., p. 118.)

1866, August 23.—The Department of the Interior ordered the withdrawal of lands on account of the grant along the company's right of way. (Rec., p. 118.)

1866, September 10.—Said order of withdrawal issued by the land department was received at the local land office. (Rec., p. 118.)

1867, ———.—Luman Barkley went to Canada and never again returned to Minnesota. (Rec., p. 64.)

1867, February 25.—The State of Minnesota turned over to the Southern Minnesota Railroad Company the grant of land received from Congress under the act of July 4, 1866. (Rec., p. 2.)

1867, July 6.—Donovan applied at the local land office to enter the land in controversy, and was informed that he would have to submit proof that Barkley had abandoned the land. (Rec., p. 64.)

1867, August.—Michael Donovan, having contested Barkley's homestead entry on the ground of abandonment, filed proof of same in the local land office. (Rec., pp. 65 and 66.)

1868, January 14.—The Barkley entry was duly canceled by the land department of the Government. (Rec., p. 121.)

1868, June 6.—Michael Donovan applied to the local land office to enter the tract as a part of his homestead, but was not permitted to do so. (Rec., p. 88.)

1870, November 29.—The Southern Minnesota Railroad Company selected the 80-acre tract of land in controversy. (Rec., p. 3.)

1871, March 25.—The land department certified said land to the State of Minnesota for the benefit of said railroad company. (Rec., p. 3.)

1871, August 8.—The State of Minnesota conveyed said land to the railroad company. (Rec., p. 4.)

1875, June.—Donovan made final proof of occupation and cultivation of the 80-acre tract in section 26, and at the same time offered to make proof of the 80-acre tract in section 35. (Rec., p. 69.)

1877, February 10.—This land was sold under a mortgage foreclosure to Mann and Camman. (Rec., p. 19.)

1877, March 3.—Said land was conveyed by Mann and Camman to the Southern Minnesota Railway Company. (Rec., p. 20.)

1883, June 28.—Donovan duly applied at the local land office to enter as an adjoining farm homestead, said tract of land in section 35, which application was rejected on the ground that the land applied for had already been certified to the State

of Minnesota for said railroad company, from which refusal Donovan duly appealed to the General Land Office, where said matter is still pending undetermined. (Rec., p. 4.)

1885, January 6.—The railway company entered into a contract with one A. Boysen for the sale of said land, which contract on the following day was assigned to one N. C. Fredericksen. (Rec., p. 4.)

1885, April 1.—Contract assigned by Fredericksen to Thomas Thompson. (Rec., p. 4.)

1885, April 1.—Thomas Thompson forcibly took possession of said tract of land, under his contract with the railroad company, and Donovan has been excluded from possession ever since that time. (Rec., p. 4.)

1885, ———.—Donovan brought suit against Thompson in the district court to regain possession of the tract.

1887, March 3.—Act of Congress passed requiring the Secretary of the Interior to adjust all railroad land grants. (24 Stat., 556.)

1887, March 24.—Said court decided that Donovan had no title to the land and awarded possession of the same to Thompson. (Rec., p. 116.)

1888, January 4.—Judgment was entered in said cause in favor of Thompson. (Rec., p. 185.)

1888, February 3.—Contract assigned by Thomas Thompson to O. C. Erichsrud. (Rec., p. 31.)

1888, March 20.—Warranty deed from the railroad company to O. C. Erichsrud. (Rec., p. 171.)

1888, March 27.—O. C. Erichsrud died intestate. (Rec., p. 140.)

1888, April 20.—Donovan files petition at the General Land Office for the institution of proceedings

under the act of March 3, 1887, to restore to the United States the title to the land in controversy. (Rec., p. 118.)

1889, February 14.—The Commissioner of the General Land Office decided that the facts alleged by Donovan were not sufficient to warrant the institution of proceedings to restore title under the act of March 3, 1887. (Rec., p. 118.)

1889, April 1.—The Secretary of the Interior reversed the decision of the Commissioner of the General Land Office and ordered the Commissioner to make demand upon the railroad company for the reconveyance of the land. (Rec., p. 120.)

1890, April 16.—The Secretary of the Interior transmitted the papers to the Attorney-General, requesting the institution of proceedings under the act of March 3, 1887, to restore the land in controversy to the United States. (Rec., p. 128.)

1893, March 6.—The United States exhibited its original bill of complaint. (Rec., p. 1.)

1894, June 20.—The United States filed an amended bill of complaint. (Rec., p. 9.)

1894, August 11.—The railroad companies answer. (Rec., p. 13.)

1896, March 2.—Act of Congress passed limiting time for such suits and confirming title in bona fide purchasers. (29 Stat., p. 2.)

1898, November 7.—The land in controversy was decreed by the probate court of Faribault County to the heirs at law of O. C. Erichsrud. (Rec., p. 178.)

1899, May 24.—These heirs at law conveyed the land to the defendant Louis K. Woodwick for the sum of $2,000. (Rec., p. 169.)

1901, March 4.—A supplemental bill of complaint was filed by the United States. Thompson and

Erichsrud not having been served, the heirs of Erichsrud were made parties. (Rec., p. 11.)

1901, May 2.—Anna Erichsrud, Addie J. Erichsrud, Mabelle H. Anderson (formerly Erichsrud), Julia P. Remington (formerly Erichsrud), and Louis K. Woodwick, answered the bill and supplemental bill. (Rec., p. 39.)

1902, January 13.—The special examiner submitted to the court his report of the testimony taken in the suit. (Rec., p. 195.)

1902, March 3.—Opinion of circuit court filed dismissing the bill. (Rec., p. 200.)

1903, June 16.—Opinion of the circuit court of appeals for the eighth circuit filed, affirming the decision of the circuit court. (Rec., p. 214.)

THE LAND-GRANT ACT OF JULY 4, 1866. (14 STAT., 87.)

CHAP. CLXVIII.—An act making an additional grant of lands to the State of Minnesota, in alternate sections, to aid in the construction of railroads in said State.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and is hereby, granted to the State of Minnesota, for the purpose of aiding in the construction of a railroad from Houston, in the county of Houston, through the counties of Fillmore, Mower, Freeborn, and Faribault, to the western boundary of the State, and also for a railroad from Hastings, through the counties of Dakota, Scott, Carver, and McLeod, to such point on the western boundary of the State as the legislature of the State may determine, every alternate section of land designated by odd numbers to the amount of five alternate sections per mile on each side of said road; but in case it shall appear that the United

States have, when the lines or route of said roads are definitely located, sold any section, or part thereof, granted as aforesaid, or that the right of preemption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or preemption has attached as aforesaid, which lands, thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by said State of Minnesota for the purposes and uses aforesaid: *Provided*, That the land so selected shall in no case be located more than twenty miles from the lines of said road: *And provided further*, That no land shall be granted or transferred by the provisions of this act not included within the jurisdiction of the State of Minnesota: *And provided further*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or other purpose whatever, be, and the same are hereby, reserved and excepted from the operations of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way shall be granted, provided the United States has yet in possession the title thereto.

SEC. 2. *And be it further enacted*, That the sections and parts of sections of land which by such grant shall remain to the United States within ten miles on each side of said road shall not be sold for less than double the minimum price of public lands when sold, nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder at or above the minimum price as aforesaid: *Provided*, That actual bona fide settlers under the preemption laws of the United States may, after due proof of settlement, improvement, and occupation as now provided by law, purchase the same at the increased minimum price: *And provided also*, That settlers under the provisions of the homestead law who shall make entries after the passage of this act, upon the sections numbered by even numbers, and who comply with the terms and requirements of said act shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding.

SEC. 3. *And be it further enacted*, That the lands hereby granted shall be subject to the disposal of the legislature of Minnesota for the purposes aforesaid and no other; and the said railroad shall be and remain public highways for the use of the Government of the United States, free of all toll or other charges upon the transportation of any property or troops of the United States, and the same shall at all times be transported at the cost, charge, and expense in all respects of the company or corporation, or their successors or assigns, having or receiving the benefit of the land grants herein made.

SEC. 4. *And be it further enacted*, That the lands hereby granted shall be disposed of by said State for

the purposes aforesaid only, and in manner following, namely: When the governor of said State shall certify to the Secretary of the Interior that any section of ten consecutive miles of said road is completed, in a good, substantial, and workmanlike manner, as a first-class railroad, then the Secretary of the Interior shall issue to the State patents for all the lands in alternate sections, or parts of sections, designated by odd numbers, situated within twenty miles of the road so completed and lying coterminous to said completed section of ten miles, and not exceeding one hundred sections, for the benefit of the road having completed the ten consecutive miles as aforesaid: *Provided, however*, That the coterminous principle hereby applied shall not extend to such lands as are taken by the said railroad companies to make up deficiencies, provided that no land to make up such deficiencies shall be taken at any point within ten miles upon each side of the line of said roads. When the governor of said State shall certify that another section of ten consecutive miles shall have been completed as aforesaid, then the Secretary of the Interior shall issue patents to said State in like manner for a like number; and when certificates of the completion of additional sections of ten consecutive miles of said roads are from time to time made as aforesaid, additional sections of lands shall be patented as aforesaid, until said roads are completed, when the whole of the lands hereby granted shall be patented to the State for the uses aforesaid, and none other: *Provided*, That if said roads are not completed within ten years from the acceptance of this grant, the said lands hereby granted and not patented shall revert to the United States.

SEC. 5. *And be it further enacted*, That as soon as the governor of said State shall file or cause to be filed

with the Secretary of the Interior maps designating the routes of said roads, then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act.

SEC. 6. *And be it further enacted*, That the United States mail shall be transported on said road, under the direction of the Post-Office Department, at such price as Congress may by law provide: *Provided*, That until such price is fixed by law, the Postmaster-General shall have power to fix the rate of compensation.

Approved, July 4, 1866.

ACT OF 1887.

The portions of the act of March 3, 1887 (24 Stat., 556), which we deem applicable to this case:

CHAP. 376.—*An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes.*

SEC. 2. That if it shall appear, upon the completion of such adjustments respectfully, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented by the United States to or for the use or benefit of any company claiming by, through, or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits, and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title hereto-

fore issued for such lands and to restore the title thereof to the United States.

SEC. 3. That if, in the adjustment of said grants, it shall appear that the homestead or preemption entry of any bona fide settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights and allowed to perfect his entry by complying with the public-land laws: *Provided*, That he has not located another claim or made an entry in lieu of the one so erroneously canceled: *And provided also*, That he did not voluntarily abandon said original entry: *And provided further*, That if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public-land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to bona fide settlers residing thereon.

SEC. 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted, and patents of the United States shall issue therefor, and shall relate back to the date of the original certifi-

cation or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the Government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney-General shall cause suit or suits to be brought against such company for the said amount: *Provided*, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified, or patented as aforesaid from recovering the purchase money therefor from the grantee company, less the amount paid to the United States by such company as by this act required: *And provided*, That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land grant for conditions broken, or as authorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions.

SEC. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor

to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the preemption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said preemption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States; as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

ACT OF MARCH 2, 1896 (29 STAT., 2.)

CHAP. 39.—*An act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon-road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to

any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: *Provided*, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.

SEC. 2. That if any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation company, person, or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum Government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons for whose benefit the certification was made for the value of the land as hereinbefore provided. Any bona fide purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and

who has not submitted his claim to the Secretary of the Interior, may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject-matter, or at his option, as prescribed in sections three and four of chapter three hundred and seventy-six of the acts of the second session of the Forty-ninth Congress.

SEC. 3. That if, at any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified, a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a bona fide purchaser or are bona fide purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a bona fide purchaser as aforesaid, or that such persons or corporations are such bona fide purchasers, then no such suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified.

Approved March 2, 1896.

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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1904.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

Chicago, Milwaukee & St. Paul Railway Company, The Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thompson, O. C. Erichsrud, Anna Erichsrud, Addie J. Erichsrud, Mabel H. Anderson nee Erichsrud, Julia P. Remington, nee Erichsrud, and Louis K. Woodwick,
Defendants.

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Appeal from U. S. C. C. A., Eighth Circuit.

Brief of Defendants Erichsrud, Anderson, Remington and Woodwick, Appellees.

ANDREW C. DUNN,
Attorney for Appellees Erichsrud, Anderson, Remington and Woodwick.

INDEX OF BRIEF OF APPELLES ERICSHRUD'S AND WOODWICK.

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Supreme Court of the United States.

OCTOBER TERM, 1904.

The UNITED STATES OF AMERICA,
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vs.

Chicago, Milwaukee & St. Paul Railway Company, The Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thompson, O. C. Erichsrud, Anna Erichsrud, Addie J. Erichsrud, Mabel H. Anderson nee Erichsrud, Julia P. Remington, nee Erichsrud, and Louis K. Woodwick,
Defendants.

Brief in behalf of defendants, appellees, Anna Erichsrud, Addie J. Erichsrud, Mabel H. Anderson *nee* Erichsrud, Julia P. Remington *nee* Erichsrud and Louis K. Woodwick.

This action involves the east half of the north-west quarter of section 35, in town 101, north of range No. 28, west, situate in the County of Faribault and State of Minnesota, and comes here on appeal by the United States from the decree of the Circuit Court of appeals Eighth Circuit, affirming the decree of the Circuit Court, United States District of Minnesota, dismissing the bill on its merits.

The United States proceeds as it alleges in its bill of complaint under the provisions of the Act of Congress approved March 3rd, 1887, relating to the adjustment of railroad grants, to have declared null and void and to set aside the certification of the land in question made on the 25th day of March, 1871, under the provisions of the act of July 4th, 1866, granting lands to the State of Minnesota for the purpose of aiding in building a railroad therein, and also all conveyances made since the said certificate, of record or otherwise, basing its claim upon the allegation that said certification was erroneous and void, because it was not embraced within the grant, and that there was a prior subsisting right in one Michael Donovan attached to the said land before its certification, which right was ignored by the Land Department erroneously. R. econ. p. 17.

The assignments of error are so general in scope — attacking and challenging the decree of the Circuit Court of Appeals in dismissing the bill from every conceivable position—alleging errors affirmative—and negative—that justice cannot be done in support and defence of the decree appealed from, otherwise than by an argument and brief covering the case somewhat in detail, as if no former adjudication had been had—this seems to me to be a necessity of the situation.

RECORD HISTORY OF THE INVOLVED LAND.

The record history of the land involved is:

1st. It is within the indemnity limits of the granting act of July 4th, 1866, being within 20 miles of the line of the railroad for whose benefit the grant was made. R. p 113. Stip. facts 111.

2nd. It, with all the lands in said limits was, by order of the Gen. Land Office, *withdrawn* from sale by order made on the 24th day of August, 1866, which order was received by the local land office at Winnebago City,

Minnesota, and became effective September 10th, 1866. See Record p. 118. Govt. Ex. "B". 10 Amended Bill.

3rd. It was certified by the United States to the State of Minnesota as a part of the lands granted under the act of July 4th, 1866, for the benefit of the Southern Minnesota Railroad Company, March 25, 1871. R. 114. Stip. facts, VI.

4th. It was conveyed by the State of Minnesota pursuant to said act by deed August 8th, 1871, to the Southern Minnesota *Railroad* Company. R. 114. Stip. facts, VI.

5th. It was sold under foreclosure proceedings in the Circuit Court of the U. S. District of Minnesota, foreclosing a mortgage made thereon by the Southern Minnesota *Railroad* Company, in February, 1877, to A. P. Mann & H. H. Camman in trust for certain creditors of said company. R. 114. Stip. facts VII.

6th. It was conveyed by said purchasers, Mann & Camman, on the 3rd day of March, 1877, to the Southern Minnesota *Railway* Company, a corporation formed under the General Laws of the State of Minnesota. R. 114. Stip. facts, VII. Abstract of Title. R. 178, item 14.

7th. It was contracted to be sold by the Southern Minnesota Railway Company to one Boysen; by him assigned to one Fredricksen, by him assigned to one Thompson, and by said Thompson assigned to defendant O. C. Erishrud. See R. Bill of Complt. p. 4, it. 15. p. 115 Stip. facts, IX.

8th. It was conveyed by the Southern Minnesota *Railway* Company, to O. C. Erichsrud March 20th, 1888. R. 115. Stip. facts IX.

9th. It was decreed by the Probate Court of Faribault County, Minnesota to the defendants, Anna Erichsrud, Addie J. Erichsrud, Mabel Anderson and Julia P. Remington, heirs of O. C. Erichsrud, deceased, Nov. 6th, 1888. R. 178, Dfs. Ex. 5.

10th. It was conveyed by Anna Erichsrud, Addie J. Erichsrud, Mabel H. Erich-

srud, and Julia Erichsrud, heirs of O. C. Erichsrud, deceased, to the defendant Woodwick, May 24th, 1889, (R. 169,) Dfs. Ex. 1., in whom now rests legal title.

THE ACT OF MARCH 3rd. 1887.

The first section of the act of March 3, 1887, under which the plaintiff claims to proceed herein, directs the Secretary of the Interior to immediately *adjust*, in accordance withthe decisions of the Supreme Court, each of the Railroad Land Grants made by Congress to aid in the construction of railroads, *and not heretofore adjusted*.

The question arises what is meant by the term adjust. Ordinarily the term would signify a regulation of the same and an orderly disposition thereof, according to law, and it seems that in the adjustment of the Land Grant involved in this action that the same *was adjusted* over 30 years ago when the Secretary with all the light he had and could find, *adjusted* this particular Land Grant as to this piece of land and certified to the State of Minnesota, the land involved herein, and declared the same to be the property of the State for the benefit of the railroad; which the State by its Legislation had designated, which was the Southern Minnesota *Railroad* Company, and which company had earned it by building the railroad.

If Congress has power to cause *land titles acquired* under the laws as interpreted by and the rules and regulations of, the Land Department of this Government to be ripped up, and *re-adjusted* every time the Court shall change its views upon a given subject or make a decision on some point concerning the same, then there would seem to be no repose and quiet to the titles obtained thereby.

The extent of the mischief and injury to private rights acquired, relying upon the integrity of the action of the Land Department in *adjustments heretofore* made of the public domain according to the granting acts of Congress which would inevitably result in the application sought to be made of that act to this case is well nigh

inconceivable. No man could hope to read his title clear, if such a flaming sword is always to be held aloft to destroy it.

In this connection I would ask the attention of the Court to that part of the answer of the defendant companies found on pages 23 (bottom) 24-25 (top) of the printed record being the views of the late Mr. John W. Carey, Solicitor of the defendant companies, upon this proposition, as a novelty; and make the same a part of this brief without reprinting same.

It is submitted that the Land Grant involved is *not one of those NOT heretofore adjusted.*

The second section of the act makes it the duty of the Secretary of the Interior in certain cases (of which this is claimed to be one) to demand of the railroad company for whose benefit the lands were certified or patented, a reconveyance of the same or a relinquishment of its right thereto to the U. S., and in the event of the refusal for the period of 90 days, then such legal action is to be taken as shall be warranted, under the facts of each case, to restore said title to the United States and to the public domain.

Now it is seen that this particular piece of land was certified to the State of Minnesota for the benefit of the Southern Minnesota *Railroad* Company, and that such company was the beneficiary under the said granting act. I ask attention to the distinction between the *Railroad* Company and *Railway* Company, they being separate organizations

A demand of re-conveyance and relinquishment was therefore a *condition precedent* to be performed before an action could be maintained *under the statute,* to cancel the certification.

There is no showing that any demand was ever made upon the Southern Minnesota *Railroad* Company, the only company on which demand would be pertinent, to restore this land, or reconvey it to the Government of the United States as required by the act, as a *condition* precedent to legal proceedings.

The said company is not made a party to this action.

A demand and refusal was pleaded and proved as to the Chicago, Milwaukee & St. Paul Railway Company, and no other company or person, evidently going upon the mistake of the pleader that the Chicago, Milwaukee & St. Paul Railway Company was the legal successor of the Southern Minnesota *Railroad* Company, but that claim is expressly denied in the answer of the defendants, is not supported by any proof, *and is not true.*

Appellant in view of this lack of notice seeks to parry its force by now claiming this action to be one brought for the purpose of removing a cloud from a title so as to convey it to defendant Donovan, whom it conceives itself in duty bound to protect.

But this action is not brought for that purpose. It is expressly alleged in the Bill R. p. 7, sec. 22, that it is brought under the provisions of the Act of March 2, 1887, and in order to carry out the mandate of Congress expressed in said act.

THE WITHDRAWAL OF THE LAND FROM SALE.

It will be seen from the history of the land as above stated, that the Secretary of the Interior, on the 23rd of August, 1866, by order to the local land office, withdrew from market the lands embraced within the provisions of the Land Grant act of July 4, 1866, including the tract in question. See R. 118, communication from the G. L. O.,, to the Secretary of the Interior.

This order of withdrawal was received at the local land office at Winnebago City, the district in which the land was situated, Sept. 10th, 1866. R. 119. R. 10 Amended Complaint.

We claim that as the land department was *at that time* administering the land laws, such withdrayal operated at once to prevent any initiation of a homestead entry on this land, and was effectual to prevent Donovan

from acquiring any right in this land after that withdrawal, which was over a year *prior* to his claim of settlement in 1867, and nearly two years *prior* to his claim of application to enter in 1868. See admission of the plaintiff found in R. 150-1-2. See Spencer vs. McDougal, 169 U. S., 62. (L. C. P. Co., Ed. 40 p. 76) where it is held.

> "That an order of the land department withdraw-
> "ing from sale lands in a certain district in which
> "lands have been granted for a railroad *not yet*
> *"located* is sufficient to defeat a subsequent pre-
> "emption of land withdrawn, although *more land*
> *"was withdrawn than was necessary."*

Also Hamblin vs. Western Land Co., 147 U. S., 531, L. C. P. Co., Ed. 37, 267, where it is held

> "That the location of the line of Railroad accepted
> "by the Land Department and the reservation of
> "the land in question from sale to satisfy the
> "grant to the Railroad, operated to withdraw the
> "land from entry of pre-emption or homestead
> "laws, and this whether the location was valid or
> "not it being accepted by the Land Department
> "and the withdrawal made accordingly."

Walcott vs. Des Moines R. & N. Co., 72, U. S. 5, Wall 681 (L. C. P. Co., 18, 689) in which the Court in speaking of the duty of the L. D., to reserve from sale the land embraced in the grant says:

> "The grant carried with it by necessary implica-
> "tion not only the power but the duty of the Land
> "Department to reserve from sale the lands em-
> "braced in grant, otherwise its object might be ut-
> "terly defeated and upon such notice it became
> "the duty of the land officials to withhold the sales
> " and reserve them to the United States."

In Wood vs. Beach, 156 U. S. 548 (L. C. P. Co., Ed. 39, 528) it is held, Sylabus:

> "Where public land has been withdrawn from sale
> "or location, pre-emption or homestead entries, no
> "rights, legal or equitable, can be acquired by oc-

"cupation or settlement thereon as against a rail-
"road company for whose benefit the withdrawal
"was made which subsequently complies with all
"the conditions of title and receives the deed there-
"for."

In the case at bar, the grant was made July 4th, 1866, and the Land Department ordered the withdrawal of the lands in both places, and the indemnity limits, on the 23rd day of August, 1866, which became binding on the local officers at time of their receipt of same, Sept. 10th, 1866. It is to be presumed that the Railroad Company had made its survey and filed its plat prior to the withdrawal of the lands, but even had that not been the case it would not affect the legal effect of the order of withdrawal.

It is difficult then, if the withdrawal had the effect claimed in the decisions cited, to see how the defendant Donovan could subsequently legally initiate an entry of the land under the Homestead Law or to have his application to enter, made when he claims to have done so.

BARCLAY ENTRY.

Donovan's application to enter is claimed to date from June 6th, 1868, and it is also claimed by the plaintiff that because of the prior entry of Barclay the order of withdrawal did not effect this particular piece of land, but it is claimed by the defendants that *order, as made and understood by the land officers,* was to reserve all the odd section land within the territory in which is situated this tract, as being *embraced within the grant,* and that such information was conveyed to Donovan on the 6th of June, 1868, when it is claimed that his application was made. R. p. 50, (top) Ev. Bullis.

At that time in the administration of the Land Department of the Government it seems that all odd sections within the granted limits, both place and indemnity, were

treated as belonging to the grant, even if encumbered with Homestead entries; if such entries should thereafter at any time prove to have been fraudulent, or should prove to have been abandoned by the entryman, and therefor cancelled, and as soon as such abandonment, or fraud, was shown to exist, and the cancellation made, the same at once attached to the grant as if such entry had never existed. So that the order of withdrawal effected this tract, provided the Barclay entry should prove fraudulent or abandoned, and the Southern Minnesota *Railroad* Company, for whose benefit the grant was made, should be and was considered at all times, from the date of the land grant, July 4th, 1866, a *legal applicant* for all lands which might be found available under the grant, but to be held in abeyance as to actual title, until the same should be earned under the terms of the grant and the legal title conveyed to it.

So, it is claimed by these defendants that the moment the homestead entry of Barclay was cancelled it became at once attached to and part of the granted lands under the *then administrative interpretation* of the land grant act, as if said entry had in fact never existed.

This view was taken by the Secretary of the Interior in certifying this tract to the State after the selection by the R. R. Co., as a part of the *granted lands*, notwithstanding the former entry of Barclay.

Under no other construction of the Land Grant act, could the rights of the company be protected within the indemnity belt—and Company acquire any lands therein that might have been cancelled for fraud or abandonment between the date of the act and the building of the road—otherwise the road might have earned the land, only to find others in possession after such earning.

It seems to me upon principle that the true construction of the Land Grant Act gives the Company the prior right of selection—in the indemnity belt, and that no disposition could be made of the odd sections therein, until it was determined that the company would not require them in lieu of lands lost—or that it was not en-

titled to them because of failure to earn them. Such was the ruling until the Dunmyer case, 113 U. S. 629, was decided. See Record p. 186.

W. St. P. Ry. Co. v. W. So. 165 U. S. 465-6.

I am not unmindful that in recent cases Nelson v. Co. 188 U. S., 108, L. Ed. 47-406. Oregon Co. vs. U. S. 189 U. S. 103 L. Ed., 47-727.

This court has held that withdrawals in indemnity limits in certain cases were without authority of law and actual settlers within those limits are not affected by such withdrawals—but in all of these cases it seems to me that the claims of the settlers were far different in status than the claim made here and in none of those cases does the question of subsequent grantees equity appear—hence those cases are seemingly inapplicable.

DONOVAN'S APPLICATION TO ENTER.

The proof fails to show that any *written or legal* application to enter this land was in fact made by Donovan on the 6th day of June, 1868, or at any time prior to date of the selection by the company, Nov. 29th, 1870.

The only attempt at an application to enter was made at a time when the land was *not subject to be entered by Donovan* because it was then covered by the entry of Barclay.

(See evidence of Bullis R. 48.) Mr. Bullis testifies that at the date of the trial initiated for the purpose of invesigating Barclay's entry, Donovan signed a paper which he, Bullis, called an application, but which bore no date, and which was made merely for the purpose of *heading off* any other applicants who might, between the date of the trial and before the return of the Land Department could be received cancelling the Barclay entry (if received,) apply to enter the land; but he further testifies R. 56-7 that the paper was destroyed and was *considered no application at all.* THAT IT WAS CON-

SIDERED *as useless and had fulfilled its function and was of no avail whatever, was thrown on floor, and that such papers were always destroyed.* This it seems was done in June, 1868, at a time when the land was *open for entry* only as to the eighty on 26, and as to the eighty in 35, he testifies that *according to our instructions from the Land Department the same was not open for entry because of its reservation under the Land Grant Act.* And he further testifies that after the said so-called application had been destroyed, Donovan then made an application for the eighty in 26 and took that. R. 59.

It would therefore seem from this testimony of the then Register of the Land Office that there was in fact *no application presented to the Land Officers* for their consideration, for this tract of land by Donovan at any time, when the same was subject to be taken, and in fact no application at any other time. Therefore there could have been no *rejection and no decision thereupon.*. Mr. Bullis further testifies that there was *no record* made of this application so-called, and nothing was ever done with it. The whole matter was wiped out dead, and was *not considered as having been an application at all.*

The Counsel for appellant however, seems to consider that the question of Donovan's application to enter this land on the 6th of June, 1868, is settled in his favor by the remark of the learned Judge of the Circuit Court, in his oral opinion herein. R. p. 203.

It does not seem to me that the Court was there deciding that a legal application was then made by Donovan —but merely voicing the claim of Donovan—whereas there is absolutely no evidence in the record that any application to enter this tract was made in June, 1868. There was some desultory talk between him—and Bullis—but no application to enter this land under any rules of the Land Office was made or offered to be made—at that time, or any other time—and the learned Judge did not intend to dignify that talk with the title of legality, as an application to enter and acquire lands. *No record* exists of it, the oral statement of the parties who engaged in

it, is its sole monument, and the accumulated dust of over a third of a century has rendered its ever having existed exceedingly doubtful if not entirely visionary.

DONOVAN'S CLAIM OF SETTLEMENT AND CULTIVATION.

It is conceded by plaintiff that unless this so-called application was followed by Donovan's actual occupancy or cultivation for the necessary period of five years, that it would not avail, and hence the proof offered to support such settlement. It will be remembered that this tract in 35 and the tract in 26 is claimed to be treated by the plaintiff as one tract, and in considering the proof such fact should be borne in mind.

It is submitted that the proof falls far short of establishing, at this distance of time, that any setlement or cultivation was had after the entry in section 26, in June, 1868, or even prior thereto, *which could be attributed to the carrying into effect of said claimed application for a homestead entry on section 35.*

.. There is no question but that Donovan was aware when he filed his application and entered the eighty in 26, that the eighty in 35, the involved tract, was what was called Railroad Land, i. e. embraced within the granted limits of the Act of July, 1866, and reserved to the Southern Minnesota *Railroad* Company. He was aware of this because he was so informed by Mr. Bullis, the Register of the Land Office. He thereupon *withdrew* and *abandoned his so-called application* for the *whole* of the land embraced in the Barclay entry, and it was then destroyed (*see R. 56-57, Evidence Bullis*) and made an application for and entered the eighty on 26.

The evidence fairly shows that he was aware of the withdrawal when he first visited the Land Office in 1867, and ordered the trial because it appears in evidence that the lands embraced in the grant including this involved

tract, were *actually withdrawn* from market, and the local land officers received such withdrawal instructions on Sept. 20, 1866. *See R. 118; also R. 10, Complaint as amended.*

Now, if the local officers of the Land Office at Winnebago City, had been thus instructed, it is a fair and lawful presumption of fact that they did their duty in the premises by so informing Donovan.

But the fact is apparent that this land was *actually withdrawn* at that time, and Donovan must have been made aware of it when he first appeared and ordered the trial to test Barclay's right. *His so-called application is not in evidence. It was destroyed by his knowledge and consent, and no record of any kind was ever made of it.*

As soon as the trial took place, some time in 1867, Mr. Donovan commenced his improvements on the eighty in 26, by building a house upon it, ignoring entirely the eighty in 35, because he knew that that was then Railroad Land, and upon which tract (35) Barclay had initiated his improvements, having broken an half acre and drawn upon it materials for a house.

It is in evidence (See evidence of Silliman R. 150, (top,) Woodwick R. 156-7.) that it was the custom among the settlers at that early day, in that part of the country, to use the vacant R. R. lands in their midst for pasturing, making hay and cultivation, until they were sold to individuals, when they would surrender it to the purchaser. Donovan's improvements and cultivation upon 35, was evidently of the same character, getting what benefit he could from the land without title, paying no taxes—a mere trespasser upon the same and nothing more.

This is apparent from the evidence of Donovan himself on page 70 when in answer to question by Mr. Gilman: "When did you cease to occupy it after that?" referring to the Thompson purchase, the witness answered, "*Mr. Thompson bought the land and of course I was dispossessed and had to give it up, and he took possession*" —Following exactly the custom as detailed by witnesses Silliman and Woodwick.

This view is strengthened by the fact that we find Donovan, in 1883, applying to the Land Department to enter this tract as an additional homestead, under the act of March, 1879, claiming *it to be public lands. See R. 191.* This claim is clearly inconsistent with the claim made here that he should be considered as the owner under the so-called application of June, 1868.

This view is further strengthened by the admitted fact that in 1885 he commenced a suit against the defendant, Thompson, in the District Court of Faribault county, to eject him from the land, after its purchase by Thompson; basing his claim to the land upon the Statute of Minnesota, *General Statute 1894, Chapter 85,* in which action he claims this land *to be public lands of the United States. See his complt. in suit vs. Thompson, p. 180-181. R. Ex. "6,"* thus totally ignoring any claim of erroneous ruling of the Land Office in rejecting his claim as a homestead, or any claim of ownership; a claim very inconsistent with the claim made here.

LACHES ESTOPPEL AND RES JUDICATA.

In this action the Court should administer the equities existing between the defendant, Donovan, and the other defendants, and not permit the United States to shield itself behind its mantle of Sovereignty for the purpose of maintaining an action, which could not otherwise be heard.

This action, although brought nominally in the name of the United States, and ostensibly for the purpose of executing the mandate of Congress found in the act of March 3rd, 1887, is in truth and fact an action brought by the defendant Donovan for his sole benefit to redress a fancied wrong, an action which he could not now maintain by reason of the application of the Law of Estoppel and Res Judicata, and Laches.

In such cases it seems to be settled that the Courts will administer the equities existing between *the real litigants before it* ignoring the attitude and sovereign character of the nominal plaintiff.

In the case of the United States vs. Beebe, 127 U. S., 338, L. P. Co., Ed. 32, 121 ,it was held, 2nd Sylabus:

> *"In case where the Government, although a nom-*
> *"inal plaintiff, has no real interest in the litiga-*
> *"tion, but has allowed its name to be used therein*
> *"for the sole benefit of a private person, the de-*
> *"fences of Laches and the Statutes of Limitations*
> *"are available, the same as in suits between private*
> *"individuals."*

In the opinion itself we find this holding:

> "The principle that the United States are not
> "bound by any Statute of Limitations nor barred
> "by any laches of their officers, however, gross, in
> "the suit brought by them as a Sovereign Govern-
> "ment, to enforce a public right or assert a public
> "interest, is established past all controversy or
> "doubt. But this case stands upon a different foot-
> "ing, and presents a different question; the ques-
> "tion is: Are these defences available to a defend-
> "ant in a case where the Government, though a
> "nominal complainant party, has no real interest
> "in the litigation, but has allowed its name to be
> "used therein for the sole benefit of a private
> "person? It has not been unusual for this Court,
> "for the purpose of Justice, to determine the real
> "parties to a suit, by reference not merely to the
> "names in which it is brought, but to the facts of
> "the case as they appear on the record."

Citing and approving the language of the Court in a former case, to-wit: New Hampshire and New York vs. Louisiana 108, U. S., 76 (27, L. P. Co. Ed. 656.)

In which case the Court looked behind and through the nominal parties on the record, and then said:

> "No one can look at the pleadings and testimony
> "in these cases without being satisfied beyond all

"doubt that they were in legal effect commenced "and are now prosecuted solely by the owners of "the bonds and coupons."

Proceeding them in the principal case cited, the Court says, deciding the question as follows:

"We are of the opinion that when the Government "is a mere formal complainant in a suit, not for "the purpose of asserting any public right, or pro- "tecting any public interest, title, or property, but "merely to form a conduit through which one pri- "vate person can conduct litigation against another "private person, a Court of Equity will not be re- "strained from administering the equities existing "between the real parties, by any exemption of the "Government, designed for the protection of the "United States alone.

"The mere use of its name in a suit for the ben- "efit of a pivaate suitor, cannot extend its immun- "ity as a Sovereign Government to said private "suitor, whereby he can avoid and escape the scru- "tiny of a Court of Equity into the matters pleaded "against him by the other party, nor stop the Court "from examining into and deciding the case ac- "cording to the principles governing Courts of "Equity in like cases between private litigants. "These principles, so far as they relate to general "Statutes of Limitations, the laches of a party, and "the lapse of time, have been rendered familiar "to the legal mind by the oft-repeated enunciation "and enforcement of them in the decisions of this "Court.

"According to these decisions Courts of Equity "recognize and give effect to the General Statutes "of Limitations as a defence to an equitable right, "when at law it would have been properly pleaded "as a bar to a legal right. They refuse to inter- "fere and give relief when there has been gross "negligence in prosecuting a claim, or where the "*lapse of time* has been so long as to afford a clear

"presumption that the witnesses to the original "transaction are dead, and the other means of "proof have disappeared."

In the more recent case of Moran vs. Horsky 178, U. S. p. 213, op-L. Ed., 44, p. 1041 the doctrine cited from U. S. vs. Beebe (supra) is fully considered approved, and applied in its fullness, to-wit:

At p. 213 (middle) "But it is well settled that when the Government proceeds to set aside its patent not for the sake of establishing its right, to the property but in the interest of some person who has an equitable claim thereto, or to whom the Government owes the duty of protecting his interests it is subjected to the same defence of Laches, Limitations and want of Equity that would attach to a like suit by an individual."

In the case of U. S. vs. Beebe, cited supra, one of the earmarks whereby the Court in that case determined the question as to who the real litigant was, was because it appeared that the attorneys for the petitioners other than the U. S. Attorney, were, by agreement, permitted to handle the case for the U. S. The Court considered that fact as strong evidence that the U. S. was a mere figurehead.

In this case there is a singular similarity. The special counsel for the Government, Mr. Gilman, who handled the case entirely in its trial for the plaintiff, appears as the attorney for the defendant Donovan, puts in his answer for him, years after his right to do so had expired, which admits the whole case of the Government against the defendants, himself included, and very humbly prays:

"*That the decree may be granted as prayed for in* "*in the bill in this action, and that the conveyance* "*of said tract of land to the said Louis K. Wood-*"*wick be cancelled null and void and held for* "*naught.*". See R. 34-39. The brief for the appel-"lant also furnishes strong evidence of having been "collaborated by the special attorney for the plain-"tiff and the solicitor for defendant Donovan."

Good evidence that the action is one solely in the interest of defendant Donovan.

The U. S. has no real interest in this litigation. No public right is to be asserted; no public property is to be preserved; no public duty is to be performed.

U. S. vs, San Jacinto Tin Co., 125 U. S. 293. L. C. P. Co., Ed. 31, 751-2.

Now upon the whole record and facts of this case *it falls directly* into the class of cases instanced by the Court in which the equities of the real parties litigant will be administered.

Donovan is the *real plaintiff* herein, and these defendants, especially the defendant *Woodwick*, the holder of the legal title, is the *real defendant*.

If therefore he (Donovan) is estopped either by reason of laches, or conduct, or otherwise, on his part or by the Statute of Limitations of Minnesota, or by the application of the doctrine of Res Judicata. Then this Court will apply here the rule of the U. S. vs. Beebe, and Moran vs. Horsky above quoted, against the complainant, the U. S.

THIS ACTION IS STALE.

It was commenced against the defendants, Railway Companies, Thompson and O. C. Eichsrud (by name only) in the year 1893, *twenty-two years after the certification*. No service was had upon any defendants ,except the two Railway Companies, until the year 1901, when the defendants, Anna Erichsrud, Addie J. Erichsrud, Mabel H. Andersen *nee* Erichsrud, Julia P. Remington *nee* Erichsrud, as heirs at law of the deceased O. C. Erichsrud, and Louis K. Woodwick, were impleaded as defendants, under a supplemental bill of complaint, filed March 4th, 1901, *thirty years after the certification, thirty-three years* after the claimed rejected Homestead entry, and upon *them* the service was made of the subpoena herein a few days only prior to the expiration of the Statutory period in which

this action could be commenced against them under the act of March 2, 1896, as to each of *them* the action was only *then* commenced.

Donovan, according to his own confession and admission, gave up his pretended possession of this land to Mr. Thompson in the year 1885, R 70, (bottom) 83. Thompson and the other defendants have been in the actual peaceable possession ever since, or more than fifteen years prior to the commencement of this action, as against Woodwick and the heirs of O. C. Erichsrud.

By the Minnesota Statute limiting the right to bring actions for the recovery of real estate to a period of 15 years from the last possession of the plaintiff, or his ancestors or grantors. Donovan is and would be barred from prosecuting an action for the recovery of this land in his own name. Gen. Stat. Minn., 1894, S. 5134.

By Section 5136, subdivision sixth, it is provided:

"Actions for relief on the ground of fraud" must be commenced within six years from the discovery of the fraud.

This statute is held to apply to an action to set aside and cancel a deed on account of fraud or to recover the property conveyed.

St. Paul S. T. E. R'y. Co. vs. Sage, 44 Fed. Rep. (per Shiras J.) 315.

It is claimed that Donovan, under the proofs herein, would be barred by sections 5134-5136 supra, from bringing any action to obtain the title to this land himself. And if so why not the U. S.

In U. S. vs. San Jacinto Tin Co., 125 U. S. 273. (An action to set aside a patent for fraud) this Court speaking through the late Mr. Justice Miller, says: *"If the doctrine that the U. S. in bringing such actions is not controlled by any statute of limitations or governed by the rule concerning laches be sound *** then the evil which may result would seem to be endless as well as enormous."* This query has been answered and ripened by the later cases of U. S. vs. Beebe and Moran vs. Horsky, cited *supra.*

RES. JUDICATA.

It is also claimed for these defendants that Donovan's claim for this land and to cancel the certificate, is as to him RES JUDICATA, and he is estopped for that reason.

By reference to the action brought by him in the District Court of Faribault County (R. 180-186,) it will be seen that that action was one to determine adverse claims to public lands of the U. S., and to recover its possession under the provisions of Chapter 85 G. S. Minn., 1894, the Complaint expressly alleges the land to be *public lands of the U .S.*, upon which the plaintiff was settled as a settler on public land, and alleges that the defendant, Thompson has taken unlawful possession of the same, and asks judgment for possession and damages.

The defendant Thompson answered and alleged his title thereto as being derived through the *certification thereof from the Government of the U. S. to the State of Minnesota and the further conveyance from the State to the Southern Minnesota Railroad Company*, and by other conveyances to himself. See R. 181.

The reply of the plaintiff Donovan put in issue the *legality of the certification by the U. S. to the State. R. 289-800.* It will thus be seen that the same issues involved in this action were involved in that, to-wit: The erroneous certification of this tract of land.

That action was duly tried on all the issues and resulted in a judgment against Donovan on the issues and merits thereof. See R. 185. 116 Stip. facts XIV.

Donovan selected his forum, and must be concluded by its decision. He rested content with that judgment, and still so rests, and it would seem that that judgment is a complete bar to his further prosecuting any action in any form either in his own name or in the name of the U. S. for his benefit, to test the validity of the acts of the Secretary of the Interior in certifying the land in question to the State under the provisions of the act of July 4th, 1866.

Hence it is claimed that inasmuch as Donovan is estopped both by the Statute of Limitations, as well as

the judgment aforesaid, the Government of the U. S. ought not to lend its aid, name and power, and shield itself behind its Sovereignity to aid him in opening and further litigating this once *determined question.*

Every consideration of *equity, fair dealing and honor* demand that the United States should not under these circumstances be permitted to maintain this action, but that this Court should administer in this action the law as well as the equities existing between Donovan and these defendants in respect to the land involved.

And upon this ground also the decree appealed from should be affirmed.

PURCHASERS IN GOOD FAITH.—THE ACT OF MARCH 2, 1896.

The defendants, the Southern Minnesota Railway Co. Erichsrud and Woodwick, the only defendants served, were *purchasers in good faith*, and as such the title conveyed by the Government through the Land Grant act of July 4th, 1866, and the certification of the State and by mesne conveyances to them, are confirmed under the provisions of the act of March 2nd, 1896, which provides in terms in the first section thereof as follows:

> *"But no patent to any land held by a bona fide pur-*
> *"chaser shall be vacated or annulled, but the right*
> *"and title of such purchaser is hereby confirmed."*

The holder of the legal title now is the defendant Woodwick, and if there ever was a purchaser of land in good faith, he has shown himself to be such in this instance.

The language of this Statute of repose is unlimited as to the purchaser. It would be sufficient if he purchased the land from any one in the chain of owners, from the Government down, if his purchase was made in good faith, for value, without notice of other conflicting claims or demands.

All of the essentials to a purchaser in good faith appears in the evidence. He himself testifies that he purchased this land from the heirs of O. C. Erichsrud, the other defendants herein, paying two thousand dollars in cash for it, in this he is corroborated by witness Anna Erichsrud, and her selling agent, F. P. Brown, without notice of any defect in the title, or claim by any person; that he was furnished with an abstract of title of the same by the selling agents of the Erichsruds, the witness F. P. Brown, which abstract is in evidence, page 173 of the Record that he relied in making such purchase upon the recitals therein, and upon the fact of the certification thereof by the Government of the U. S. to the State, and by the conveyance by the State to the Southern Minnesota *Railroad* Company. R. 154.

The abstract (R. 173) is complete, showing the claim of title from the Government down to the defendant, Woodwick, disclosing a clear title in fee to the premises in defendant Woodwick, as well as to all of the prior owners, including the deceased defendant, O. C. Erichsrud. The other muniments of the title, the deed of O. C. Erichsrud, the probate decree, and the conveyance to Woodwick from the heirs, are in evidence and show such a title as is unassailable in law or equity upon the record.

The case of U. S. vs. W. St. P. R'y. Co., 165 U. S. 480, L. C. P. Co., 41-79, is apparently decisive as to the matter of good faith in these defendants. Upon the undisputed evidence they are each of them from the Southern Minnesota Railroad Company down to and including Woodwick, within the rules and interpretations of this Statute of 1896, as declared by Judge Brewer in that case. Says the Court:

> "It matters not what *constructive* notice may be "chargeable to such a purchaser if in actual ignor- "ance of any defect in any Railroad title, and in "reliance upon actions of the Government in the "apparent transfer of title by certificate or patent, "he has made an honest purchase of the land."

When this land was certified by the Government to the State there was an absolutely clean record behind it, it was public land in the *statutory sense of the term, and free from any individual or any other claims.* The homestead entry of Barclay had been cancelled for abandonment since January, 1868. See Stipulation R. 114, IV. Also see defendant's Ex. "A," page 187, R., being a certified copy of the Plat Book of the U. S. L. O. at Washington. See also Certificate Register and Receiver of the Land Office at Jackson, page 191-192 R., where they certify *that there is no Homestead, pre-emption, State or valid claims to any portion of any of the lands certified on file or record in their office.*

And by the records of land titles in the office of the Register of Deeds in Faribault County, upon which defendants purchasers had a right to rely, there was no intimation or evidence of any claim or title by any person other than the grantee of the State, to-wit, the Southern Minnesota *Railroad* Company, and its grantees, including this defendant Woodwick, the present holder of the title; neither was there any notice of the pendency of this action filed or recorded in the office of the Register of Deeds of Faribault County, as required by the Statute of the State of Minnesota, in order to give intended purchasers notice of claimed defects in the title of the land involved herein. *G. S. Minn. 1894, S. 5866.*

Woodwick had a right, as he testifies he did, to rely upon the *apparent transfer of title by the Government by its certificate to the Southern Minnesota Railroad Company* and the subsequent transfers by said Company and its grantees. R. 153-154.

But I do not understand that Appellant challenges the good faith of the defendants in the purchase of this land by reason of any constructive notice to them, or either of them, but it does challenge the same upon the ground that the claimed visible possession by Donovan of the land was sufficient notice to them of his rights, and that therefore they cannot be held to be purchasers in good faith.

Further Appellant claimed in the court below and may here that because the answer of defendants Railway Companies—admits and alleges upon information and belief that the defendant O. C. Erichsrud (who is not served herein) took the assignment of the Thompson contract as a collateral security for money loaned by him to Thompson, R. p. 20-21, that neither he nor his grantees are to be protected as purchasers in good faith under the act of March 2nd, 1896, or otherwise.

But the answer of the defendants Woodwick and the heirs of Erichsrud, deceased, expressly deny the allegation in the bill, R. p. 4, item 15, charging that Erichsrud so took the title to the land—and refuse to adopt that admission in their answer expressly. *See answer of defendants Erichsrud and Woodwick R. 41 and R. p. 43, and* alleges that the purchases of Erichsrud and Woodwick were *bona-fide,* and not upon any trust; or as security—the proof of that proposition amply sustains their contention.

It is absurd to claim that such admission by the Railroad Companies (mistaken as it is) could bind the defendants Erichsrud or Woodwick, or affect their standing as bona-fide purchasers—or drive them out and away from the protection of the Statute.

The further claim that because of certain covenants of warranty found in the conveyances to Erichsrud and Woodwick, the money value of which does not appear this Court should override the well established rules governing an equity action applicable to parties, who have dealt with titles obtained from the Government of the United States, as have the parties here—and wrest from them, titles thus acquired, for the benefit of one who has shown no equities in himself—and remit them to their covenants of doubtful value at least, for redress; should find no favor here.

DONOVAN'S POSSESSION PRIOR TO 1885.

What sort of possession did Donovan have to this land and under what claim or right?

It is evident that whatever possession he had of the land in 35 was merely an annex to his possission under his actual entry of the piece in 26. No claim is made that he ever caused a filing of any kind to be made upon it upon the record. The most that can be said is that when at the Land Office he was told that he could not take it, that it was Railroad land, he then acquiesced in that statement, and his paper, whatever it was, was torn up and destroyed, and in the language of witness Bullis, was considered as no application; it was a mere bluff any way, it had performed its duty as a scare-crow and was voluntarily destroyed, and a legal application made for the piece in 26, which tract he actually did take and enter.

In the matter of actual visible possession he testifies that he built his house on 26, ignoring the building spot selected by Barclay in 35. His improvement was mainly done on 26, and in fact nothing was done on 35 until the year 1868, at or about the time he went to file his application on 26, in June of that year, after the entry of Barclay had been cancelled, according to his statement, and after he had been informed of the status of 35; he was then actually living on 26, although using some of the land in 35. As characterizing his possession in 35 I wish to call attention to a statement made by him in his evidence (R. 69, top,) in answer to question in chief as to how the balance of the eighty in 35 was used, he answered:

> "I had not pasture enough, so I cut hay and pas-
> "tured my cattle upon it."

A strange answer to make if he was claiming the eighty as his, to apologize for the trespass, because he hadn't pasture enough of his own, on his homestead in 26. Such a statement is entirely consistent with his possession as a trespasser on this *Railroad* land, but inconsistent with his present claim.

Now up to 1885 what would an intended purchaser of this land have ascertained as to the title or ownership on the *ground and on the record.*

1. He would have found a clear title on the record in the Southern Minnesota Railway Company.

2. He would have found Donovan living on section 26 under a patent from the government as a homesteader, and also found him occasionally using a part of section 35 by cropping, pasturing and haying thereon, after the fashion and custom of other settlers of that day, in that neighborhood, who were thus unlawfully using vacant lands, according to testimony of witnesses Silliman and Woodwick, and as a trespasser and nothing more.

Now what would an intending purchaser of this land have ascertained from inquiry if he had found Donovan in such possession as he claims he was, not actually residing upon it, but using it as he claims he did. He would have learned from him, if asked, that this was a piece of Government land that he was trying to hold as an additional homestead under the act of 1879; that he had made application for it in 1883, and his papers were then on file at the Land Department. *No other claim had been made up to that time.*

Such information would have given him no notice of any defect in the title conveyed by the Government to the State of Minnesota.

This view is deduced from the acts of Donovan in applying for this land, in 1883, as an additional homestead, under the plea that it was Government land, R. p. 194, and also from the allegations of his complaint in his action against Thompson, "That the same was Public Lands of the United States." His claim was that it was Public Land all the time and nothing more. R. 180.

So we find up to the year A. D. 1885, and during all of the time he now claims to have been in possession, there would not and could not have been any information or facts revealed to an inquirer that could have served, if true, to defeat a title taken from the legal owner of the same.

Titles to Public Land can not be acquired by merely squatting upon it. Some actual notice must be given to the world through the *legal channels of the Land Department* within the periods and in the mode and manner limited and provided by law.

K. P. Co. vs. Dunmeyer, 113 U. S. 629, L. C. P. C., Ed. 28-1122.

Donovan took his chances of the R. R. Co. forfeiting its rights to this land in such occupancy as he made of it, but the Company did not fail but it earned the land and received the title from the United States.

It was only after the decision in the Dunmeyer case (which decision opened a field for adventurers and supplanters,) that we find Donovan making any sort of claim to this land, and then only claimed it to be "Public Lands, evidently because of the former Barclay entry, and not until the passage of the act of 1887, do find him asserting any claim to have been injured in his rights by any refusal to permit his entry as is claimed in this suit.

CONDITIONS SUBSEQUENT TO 1885.

ABANDONMENT BY DONOVAN OF POSSESSION.

But neither the defendants, Erichsrud or Woodwick, are chargeable with notice by any visible or actual possession of this tract by Donovan, because by his own evidence as well as that of Woodwick and Hagen, there was *no possession* whatever by him after A. D. 1885, at the time he began his suit with Thompson. See evidence of Donovan, R. 170-171, where he testifies that he *gave up possession to Thompson* in 1885, without force or legal eviction. Simply said that Thompson was "boozing, drinking, and I did not like his appearance. I did not want to get

into any trouble, so I sued him to see if I could get him out." That was nearly two years before the suit was decided and was all the eviction so frequently spoken of in this case of Donovan by Thompson. It amounted simply to a voluntary yielding of such possession as he had to Thompson, and as Donovan says in another part of his testimony that *"Thompson bought the land and of course I was dispossessed and had to give it up, and he took possession."* R. 70.

Donovan has not been in possession under any sort of claim since that surrender to Thompson in 1885, except that he claims that he pastured some and dug a ditch after Thompson took posession. This presumably by Thompson's consent. So at the date that O. C. Erichsrud took possession under his assignment from Thompson of the contract and later under his deed from the Southern Minnesota Railway Company in the year 1888, no one has been in possession but Thompson and these defendants.

The evidence is clear that no one but the Erichsrud heirs were in possession of this land at the time it was sold to Woodwick. The evidence of Hagen, administrator of the estate of O. C. Erichsrud, R. 134, of Brown, R. 139, of Anna Erichsrud, R. 140, of Ross, R. 160, all corroborate this fact of the peaceable and quiet possession of the Erichsrud heirs at the time of its sale to Woodwick.

Woodwick's own testimony clinches the nail on the head, so to speak, as to his want of notice or knowledge of any actual facts anterior to the service of the subpoena on him in 1901 of any dispute as to the title. R. 152, et seq.

In fact the case is clear as to the absence of notice or knowledge of any kind brought home or chargeable to either of these defendants of any claim of right by any one or of any fact subsequent to, or independent of, the certification or patent, of any defect in the title of the railroad company or any of the grantees of this land, prior to the service of the subpoena on them.

In this respect this case is easily distinguished from the second W. & St. P. case relied upon by the plaintiff;

in the court below and may be here, in that case, the claimant Marshall was in possession, and had been for twenty years under a *recorded claim of title*, and was in actual possession when the action was brought by the purchasers from the railroad company to eject him, his preemption filing was made *prior* to the land grant, and *had never been cancelled*, the Court held, that under such circumstances, the purchase by the land company was not in good faith. But in this case there is *no recorded title* of any kind to aid Donovan, and no possession by the claimant Donovan at any time, when these defendants became interested in the land, by purchase, and no notice of any kind, constructive or otherwise, brought home or chargeable to them or either of them, of any defect in the title.

So on this proposition we insist: These defendants are protected and their title as purchasers in good faith is confirmed by the act of March 2nd, 1896, as well as by every principle of equity and good conscience.

And neither the learned Judge of the Circuit Court, nor the full bench of C. C. A. 8th Circuit committed error of commission or omission in holding that the defendant, Woodwick, was a purchaser in good faith.

DONOVAN'S CLAIMED VESTED RIGHTS.

But it is urged by the plaintiff that notwithstanding the good faith of the defendants and the decisions of the Courts confirming titles in such purchasers, where technically the certification was erroneous because of a prior entry at date of the grant, that it was not in the power of Congress by the act of March 2nd, 1896, to confirm this title, because of the claim of vested right of Donovan under the Homestead Law.

In Frisbie vs. Whitney, 9 Wall, 187, 76 U. S. L. C. P. Ed. XIX, 668, and Yosemite Valley Case, 15 Wall, 77, 82, U. S. L. C. P. Ed. XXI, 82, it is held:

"That a party by mere settlement upon public lands "with intention to obtain title to same under the "pre-emption laws, did not thereby acquire such "vested interest in the premises as to deprive Con- "gress of the power to dispose of the property, that "nothwithstanding the settlement Congress could "reserve the lands from sale. . . . That "such settlement, even if accompanied by improve- "ment, did not confer upon the settler any right "in the land as against the U. S., or impair in any "respect the right of Congress to dispose of the land "in any way it might deem proper; that the power "of regulation and disposition conferred upon Con- "gress by the Constitution, only ceased, when all "the preliminary acts prescribed by law for the "acquisition of the title, including the *payment of "the price of the land*, had been performed by the "settler. When these pre-requisites had been com- "plied with, the settler for the first time acquired "a vested interest in the premises of which he could "not be subsequently deprived. He was then en- "titled to a certificate of entry from the local Land "Offices, and ultimately to a patent from the U. S."

Therefore the force of the claim made as to vested right will depend upon a question of fact, to-wit: Has the defendant Donovan shown by the proofs in this case that he had complied with all of the requirements of the Land Laws up to and including the payment of the required fees and price of the land so as to entitle him to a certificate of entry which would ultimate in a patent of the United States?

I have shown heretofore in this brief, that the proofs fall far short of that end.

The case of Donovan depends principally on his own unaided oath as to his compliance with the Land Laws. Mr. Bullis, the ex-Register of the Land Office, who appears as Donovan's witness, fails to corroborate him upon the essential features of the case, but on the contrary contradicts him upon the most essential feature, to-wit: The

filing or offering a formal application for the initiating of a Homestead entry upon the land involved.

He (Bullis) calls the paper under consideration *a mere bluff made to head off some one else, and when it had served its purpose it was destroyed, and was considered as no application, and that then afterwards Donovan made an application for the eighty in 26*, did not amend the old one, so-called, or have it preserved as evidence of his actions, *but it was thrown away*, destroyed as waste paper by *being thrown on the floor,as was done by all such papers, as Bullis testified, R.* 56-57, and in fact upon all of the points necessary to establish that in June, 1868, Donovan made a *bona-fide, persistent attempt to file a Homestead entry on this tract in 35*, but was thereto prevented by the erroneous rulings of the Land Officer, Bullis, there is absoluttely no evidence worthy of consideration. No ruling was made, no application was presented calling for a ruling. It is absurd, to say the least of it, the attempt to dignify that transaction as a bona-fide, persistent attempt by Donovan to file and initiate thereby a Homestead entry on this involved land.

The only attempt at an orderly legal application and initiation of a Homestead entry to this land by Donovan is his application to enter it as an additional Homestead to his entry on 26, in A. D. 1883, and the method of procedure there had, is strong confirmatory evidence of the evidence of Mr. Bullis, to the effect that his effort in 1868 wah actually abandoned, and as Bullis testified, was considered as *no application at all.* [1]

That was the decision of the Commissioner of the Gen. Land Office, Mr. Stockslager, R. 118-119, and seems to be better law and common sense than the decision of Mr. Secretary Noble over-ruling the same.

Mr. Stockslager held upon the meager proofs offered to him, to-wit: the petition of Donovan (not here) and the affidavits, R. 88, a. b. c. that Donovan abandoned at that time, and waived his right to enter the tract in 35, by his own showing, and now after a lapse of thirty-three years and the opportunity of cross-examination of the wit-

nesses afforded by the trial hereof, such an actual abandonment and waiver of his right (if it existed) abundantly appears.

It will be seen that during all of the years from 1868 down to 1888 when the affidavits were made, R. 88 a, no mention is made by Donovan, whenever he speaks of this land, of any claim to have made a homestead application entry in 1868, but he always speaks of it as public land. See his complaint in the Thompson case, R. 180, wherein he alleegs *"That said land is public land of the United States;"* also his affidavit made on his application to enter it as an additional Homestead in 1883 where he swears "That he has resided upon and cultivated the same as an additional to his final entry No. 3,568 for E½, S. W¼. 26, 101, 28." R. 194.

Note the orderly manner that this 1883 application wast treated; it was *not thrown on the floor*, it was *not desroyed*, it was *not considered as no application at all*, but was cerefully preserved, filed, and its rejection orderly and noted on the same. R. 195.

It would appear from this that there is at least a suspicion of collusion between the ex-Register of the Land Office, who has testified here, and claimant Donovan, in this unholy attempt to wrest this land from the rightful owner, Defendant Woodwick.

A careful consideration of the evidence of the acts of Donovan after being told, as he claims he was, that the 80 in 35 was Railroad Land, and was withdrawn from market, in abandoning any attempt to enter the same, in proceeding to enter and occupying the 80 in 26, placing his dwelling and improvements thereon, and in 1883, nearly 20 years afterwards, treating and claiming it as public lands, applying for it as additional homestead, declaring in his affidavit therefor that he has resided upon it, as an *additional to his former entry;* and again in 1885 when his additional application had been repected because of the certification here complained of and pending an appeal thereon, with full knowledge of the railway company's claim after having been informed of its sale to

Thompson, voluntarily surrendering what possession he had of it, to Thompson, the purchaser from the ocmpany; afterwards in 1885 bringing an action in the Courts of the State of Minnesota under the Statute of said State relating to adverse claimants to *public lands*, asserting in his complaint that the land was *public lands of the United States open to settlement*, thereby serving notice on Thompson and all who came after him in title that his claim was that it *was public lands* and *not his homestead*, and then after the action was determined against him, acquiescing in the decision, paying the costs thereof, surrendering and abandoning any further claim to its possession, or claim of any kind to it, afterwards applying to the widow of the deceased defendant Erichsrud to purchase the same from her, all completely and effectually *discredit* his claim to have settled upon and occupied said land by virtue of his so-called application to enter the same in 1868 as a Homestead; the claimed rejection of which application is here alleged, as the base of this action, and yet upon reading his evidence we are led to belive that he had been supplied with every decision of the Supreme Court concerning erroneous certifications, and the essential matters to show the same from the Dunmeyer case in 1884 down to the 2nd W. & St. P. case, and even down to date, and attempted under the lead of his skillful counsel—the special counsel for the U. S. to fit and make his statements to conform to every phase of all the decisions ever made upon the subject.

Now upon his own *unaided, uncorroborated oath*, upon all the material points and in face of all these facts and of his acts, this man Donovan asks to upset and destroy an adjudication of the Land Department of this Government, made over 30 years ago, certifying this land to the State of Minnesota, for the benefit of the Southern Minnesota Railroad Company, after said company had earned it under the act of congress granting the same by building a railroad across the state.

To justify this Court in reaching the result prayed for by the complainant and Donovan, under the circumstances of this case, after the lapse of time here shown, even if the controversy was between the Government and Donovan and the original S. M. *Railroad* Company—without the fact of the equities of these defendants appearing for consideration, the proofs should be so clear and satisfactory as to amount in fact, to an absolute, undisputed certainty. No doubtful evidence should suffice. Courts do not overturn Decrees and Land Titles upon disputed, doubtful evidence.

Maxwell Land Grant case 121, U. S. 325, L. C. P. Ed. 30, 949. U. S. San Jacinto Tin Co., 125 U. S. 273. *Supra.*

And so I ask is it possible that the unaided oath of a man in his own interest can serve and be sufficient to uproot, destroy, vacate and annul the solemn adjudication of the Interior Department of this Government in a matter of which it had full purisdiction, and in which the records were clear and clean of dispute, and thus destroy property and private rights, based and bottomed upon a firm reliance upon the integrity and legality of that action?

It would not be fair, and if unfair, inequitable and unjust. Property and private rights, based upon the integrity of the actions of a Sovereign Government, are too sacred to be set aside in that manner and by such a means.

Any determination of this action, other than affirmance of the Decree appealed from would work an injury to these defendants which this Court under the evidence herein will not inflict. Not only would it cause a loss of property, but would have a tendecy to weaken that regard for the stability of our laws, and the protection which the law casts around its every citizen, and his every legal right, which all good citizens entertain.

It is therefore submitted that upon the whole Record, the Circuit Court of Appeals committed no error, either affirmative or negative, in its judgment and decree affirming the Decree of the Circuit Court Dismissing the Bill herein on the merits, and the same should be affirmed.

ANDREW C. DUNN.

Solicitor for Defendants, Anna Erichsrud, Addie J. Erichsrud, Mabel H. Anderson, nee Erichsrud. Julia P. Remington, nee Erichsrud, and Louis K. Woodwick.—Appellees.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, *Appellant*, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, et al.	No. 84. (No. 317 of Term of 1903.)

(Appeal from Eighth Circuit.)

BRIEF FOR RAILWAY COMPANIES.

BURTON, HANSON and W. H. NORRIS,
Solicitors for Railway Companies.

THE GUNTHORP-WARREN PRINTING CO., 118 RANDOLPH ST., CHICAGO.

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APPENDIX 69

Minnesota statutes.

Limitations.

Action to determine adverse claims.

IN THE

Supreme Court of the United States.

Appeal from Eighth Circuit Minnesota.

OCTOBER TERM, A. D. 1904.

THE UNITED STATES, *Appellant*, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, THE SOUTHERN MINNESOTA RAILWAY COMPANY, MICHAEL DONOVAN, THOMAS S. THOMSON, O. C. ERICHSRUD, ANNA ERICHSRUD, ADDIE J. ERICHSRUD, MABELLE H. ANDERSON nee ERICHSRUD, JULIA P. REMINGTON, nee ERICHSRUD and LOUIS K. WOODWICK.	No. 84. (No. 317 of Term of 1903.)

I.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY HAS NO PROPER RELATION TO THIS SUIT; AND NO RELATION TO THE RELIEF SOUGHT. IT HAS NO RELATION TO THE SUIT, EXCEPT AS HAVING BEEN MISTAKENLY MADE DEFENDANT, AND AS HAVING AS MISTAKENLY JOINED IN ANSWER, AS IF PROPERLY IMPLEADED.

This suit is concerned, not with a land grant as such, but with a specific eighty-acre tract which once happened to be an item of a land grant.

The bill claims the *land itself*, not an accounting, *not any value* of the land.

When the initial bill was filed in March, 1893, neither railroad company had any interest in the land, it having been purchased, by warranty deed, about five years before, by O. C. Erichsrud, whose widow and children conveyed the same by warranty deed to Woodwick in 1899, nearly two years before the filing of the supplemental bill under which alone said widow and children and Woodwick became parties defendant.

With this eighty-acre tract, the Chicago, Milwaukee and St. Paul Railway Company never had, and except in and by Mr. Cary's manifest mistake in pleading equitable ownership through stock ownership, never claimed to have anything whatever to do; and this is demonstrated as well by the allegations of the Bill, as by the Stipulated Facts and by the Abstract of Title in evidence.

Item or division "15th" of the Bill (Record 4), alleges that the Southern Minnesota Railway Company contracted this land to Boysen January 5, 1885, and that the Southern Minnesota Railway Company, on the 20th day of March, 1888, executed a conveyance of this land to O. C. Erichsrud (later appearing to have been husband and father of the natural persons defendants other than Donovan and Woodwick); which conveyance was duly recorded in Fairibault County June 8, 1888, within a few weeks of five years before this ancient suit began.

It is true that item or division "16th" of the Bill (Record, 5) *charges* that the Chicago, Milwaukee and St. Paul Railway Company became and is the owner

of the grant made by the Act of Congress of July 5 (meaning 4), 1866, instead of the Southern Minnesota Railroad Company and the Southern Minnesota Railway Company, and became the *successor in interest* of those companies *as to said grant*, and stands in their place with regard to that grant and to the particular tract in question.

It fails to disclose how or why—and no proof in the case shows how or why.

On the contrary, the Stipulated Facts (IX, Record, 115) show that the Southern Minnesota Railway Company contracted to Boysen January 5, 1885, as alleged by the Bill; and the same item of the Stipulated Facts (Record, 115) and the abstract (Record, 176, top), show the tract in question to have been conveyed by the Southern Minnesota Railway Company March 20, 1888, and that conveyance to have been recorded June 8, 1888, as in that behalf alleged by the bill.

The deed appears at pp. 171-173 of the Record.

There is a total absence of proof, either to substantiate item or division "16th" of the Bill in any respect, or to establish or suggest any connection or relation between the tract in suit and the Chicago, Milwaukee and St. Paul Railway Company. *Nowhere in any of the proofs is that company mentioned.* And, except in its abstract of the railway companies' answer, every earlier brief for Complainant has been likewise silent.

The whole record of title is before the court, and as to the Chicago, Milwaukee and St. Paul Railway Company, the Bill and proofs *establish its misjoinder* as defendant; while the answer of the two railway com-

panies, denied by the replication so far as at variance with the bill, when compared with item or division "15th" of the bill *and with the proofs*, demonstrates the mere clerical error of our late general counsel, Mr. Cary (attributable probably to inaccurate information or to failing health), in supposing and naming the Chicago, Milwaukee and St. Paul Railway Company, instead of the Southern Minnesota Railway Company, as the contractor with Boysen and grantor to Erichsrud.

Until the retainer of Mr. Gilman as special counsel this case had lain fallow for years, and these mistakes were undiscovered until he detected them.

We contend no further on behalf of the Chicago, Milwaukee and St. Paul Railway Company, but in the remainder of this brief stand only for the Southern Minnesota Railway Company and its grantees, and for them only on account of the responsibility of the Southern Minnesota Railway Company under its warranty deed to Erichsrud. (Record, 115; 171-173.)

II.

PRELIMINARY AND EXPLANATORY PRACTICE.

The Government Counsel who took this appeal, by way of assignment of errors for its purposes, first (Record, 219-220) assigned seven supposed errors (distinguished by Roman numerals) of the affirming judgment or decree of the Circuit Court of Appeals; and then (Record, 220), as "VIII," further adopted "as assignments of errors herein each and all of the assignments made and filed in its (the U. S.) appeal from the court below to this court (the Court of Ap-

peals) as fully and to the same extent as if such assignments were repeated and restated; and he then added, "and the same are hereby referred to and made a part of the Assignments of Errors herein."

These earlier assignments appear on pages 207-9 of the Record, distinguished by the adjectives "First, Second," etc.

Had "VIII" been made "I," and had "I" been made "II," etc., the arrangement might have seemed more logical—but disregarding mere arrangement, we are confronted with all the supposed errors of the Circuit (or trial) Court, as not having been specifically annulled or corrected by the Court of Appeals, and by seven specific supposedly original errors of the Court of Appeals itself.

These latter seven (I to VII, inclusive) more or less involve questions within the scope of the errors earlier assigned to the decree of the Circuit (or trial) Court.

They raise no new question, suggest no new principle, material to the legal or equitable merits of this controversy.

They attack, not the judgment or decree of affirmance, but the reasons for affirmance formulated, without necessity, by the Judge who wrote the opinion of the Court of Appeals.

The concluding pages of every volume of the United State Reports set forth many "Decisions announced without opinions."

If the decree of the Circuit Court was right, it matters not if every reason assigned by Judge Lochren was without reason.

If the affirmance of his decree by the Court of Appeals was right because the original decree was itself right, it matters not if every reason for affirmance set forth in Judge Carland's opinion was erroneous or a misfit.

The appeal here is not from opinion or stated reasons for opinion, but from the judgment or decree of affirmance; and the present question is, was the affirmed decree itself right or wrong; and Atty. Gen. Purdy's brief concedes this. (Fot of his page 73.)

Judge Carland's last sentence (Record, 217) was, "The decree below was for the right party, and is affirmed."

We affirm his conclusion and adopt his reasoning, throughout, as part of our argument, and have nothing further to reply to Assignments of Error "I" to "VII," inclusive, except as any part of their significance may be involved in the earlier assignments adopted and bunched as "VIII," to which we hereinafter refer by their respective designations in ordinal adjectives, not in Roman numerals.

III.

AS AGAINST THE SOUTHERN MINNESOTA RAILWAY COMPANY AND THOSE WHO HAVE CLAIMED OR NOW CLAIM UNDER IT, THIS ACTION WAS PREMATURELY, IRREGULARLY AND UNLAWFULLY BROUGHT, AND SHOULD THEREFORE BE DISMISSED.

This action is avowedly brought (item or division "22nd" of the Bill, Record 7), "by and under the au-

"thority of and pursuant to the (said) Act of Con-"gress, approved March 3, 1887" (the full title of which is set forth in item or division "17" of Bill). (Record 5.)

Why so brought? No one could think an enabling act necessary to authorize a suit by the United States, upon general Equity principles, for the vindication of its own sovereign right of property, or for its own necessary reinstatement in a position of power to discharge an *obligatory* sovereign duty, if such there can be.

This statute did not multiply or enlarge the equities enforceable by the United States as a sovereign. Though Congress probably cannot create a new equity or power of equity enforceable retrospectively or retroactively as against previously acquired rights of a citizen; though it cannot rescind a vested right, or forbid or impair the enforcement, by private suit, of an equity otherwise controlling, it certainly can limit and regulate, can legislate away in whole or in part, *its own* pre-existing rights of prosecution, legal or equitable; it most certainly can abridge, limit or condition, by time, by defined circumstances, or by prescribed order of essential preliminaries, its own rights as a suitor, and the powers, otherwise discretionary, of its own officers, in respect to the institution of suits.

These things Congress did by the act of 1887; yet more by the five year limitation act of March 3, 1891 (26 Stat., 1093); and, with yet more consideration for the purchaser in good faith, by the act of March 2, 1896 (29 Stat., 42, quoted in 165 U. S., pp. 468-9), which in its Secs. 1 and 2, explicitly *forbids* vacation or an-

nulment of any Patent to lands held by a *bona fide* purchaser.

And in *United States* v. *Winona, &c., R. R.*, 165 U. S., at pp. 476, 477, the court, referring to the act of 1896 as affording *more* protection than mere limitation of time, and to its passage *after* the commencement of the suit then in hand, pronounced it "none the less an act "to be considered," *because*, "there can be no question "of the power of Congress to terminate, by appropri- "ate legislation, any suit brought to assert simply the "rights of the *government*. * * * And Congress "could at any time prior to the final decree in this (the "Supreme) Court, direct the withdrawal of such suit."

The act of 1896 then *governs* a suit brought under the act of 1887, by extending further protection, further immunity to the purchaser in good faith.

And upon the same page (476 of 165 U. S.), though the act of 1887 in terms referred to lands erroneously *certified* or *patented*, while the act of 1896 in its first section (as quoted by the court at foot of page 476) mentioned only *patents*, the Supreme Court pronounced "the opinion that Congress intended, by the "sentence * * * quoted from the act of 1896, to "confirm the title, which *in this case* passed by certifi- "cation to the state."

Obviously, any suit of the sovereign for the benefit of a citizen must be instituted and prosecuted at the sole discretion of the sovereign. No citizen can compel the sovereign to prosecute. The United States may, therefore, in certain cases and in the absence of prohibitory legislation, prosecute a suit of private in-

terest, or may by legislation directed to the restraint of its prosecuting officers, *retire* from the maintenance of private rights, leaving citizens possessed of such rights to pursue their private remedies in any appropriate forum. Aside from the matter of expense, this course not only need not be of injury to the citizen thus left to himself, but may even be of benefit to him, as mentioned in the Ard cases, where (p. 540) it appears that *before* sustaining Ard's titles as against grantees of the railroad companies, the Supreme Court had, in other suits brought by the United States, ruled, that the *United States* had "no cause of action against "the railway company or its grantees to disturb the "legal title thus conveyed."

We insist that this action—any action under the act of 1887—is a statutory action, a remedy to be adopted or resorted to, in any particular instance, only under the preliminary conditions prescribed by that act; that the act of 1887, coupled with the act of 1891, besides establishing a period of limitation and imposing circumstantial restrictions upon relief grantable in suits regularly begun, further circumscribed the equity rights and powers naturally original and inherent in the sovereign, by prescribing *conditions precedent* to such suit, and the sequence of such conditions; by establishing an ordered practice to be thenceforth essentially preliminary to any such suit; that the system thus created was by the rule of "*expressio unius,*" etc., made an *exclusive* system; and that no suit is maintainable under authority of that act until after due observance of such practice, due compliance with such precedent conditions.

What does the act of 1887 thus require? In section 2 it is provided that if, in course of the adjustments it shall appear that any land has been erroneously certified or patented for the use or benefit of any company claiming under a grant in aid of railroad construction, it shall be the duty of the secretary *to thereupon demand from* SUCH *company a relinquishment or reconveyance*, etc.; and that *if* SUCH *company* shall neglect or fail to so reconvey * * * *within ninety days after the aforesaid demand*, it shall *thereupon* be the duty of the Attorney General to commence and prosecute * * * the necessary proceedings to cancel, etc.

The first prescribed duty of the Secretary after discovery of erroneous patent or certification, is to demand relinquishment or reconveyance by *the* company for whose use or benefit the land was patented or certified.

His second duty is to allow the demandee ninety days for compliance—doubtless in order to give that company time, not only for investigation, but, if it has meanwhile sold, to endeavor to obtain relinquishment or reconveyance from its own grantee.

His third duty, after such ninety days, is to move the Attorney General to bring suit.

What performance of these duties does the Bill allege? Only that, after citing the *Chicago, Milwaukee & St. Paul Railway Company* (Bill, "17th," Record, 5), *no other company*, and after the responsive appearance of that company (Bill, "18th," Record, 6), and the adverse conclusion of the Secretary, he, the Secre-

tary, "caused a proper demand in writing to be made "upon *said* company for the reconveyance," etc., within ninety days thereafter; that such demand was made on April 9, 1889, "but that *said* company refused "to comply therewith, and has ever since," etc. (Bill, "19th," Record, 16.)

What do the proofs show?

The only proof of demand is in Government Exhibit "D" (Record, 127), referred to by Paragraph XII of the Stipulated Facts (Record, 116), in the statement by the commissioner to the secretary that the *commissioner's office, not the secretary*, had by letter, dated April 9, 1889, and addressed to H. G. Haugan, Land Commissioner of the *Chicago, Milwaukee & St. Paul Railway Company*, made formal demand for the reconveyance of title to the land described.

The specific language of the letter of demand (again mentioned as item 6, on page 127 of the Record), is not further made to appear, but is not here material.

Such semblance of proof as we thus have supports the allegation of the bill that the only demand attempted was made solely upon the *Chicago, Milwaukee and St. Paul Railway Company*, the imagined "successor in interest of the Southern Minnesota Railroad Company and the Southern Minnesota Railway Company."

Suppose the demand made as alleged by the Bill, as stated by the commissioner's letter, Government Exhibit "D"—WHAT OF IT?

It was not made upon the Southern Minnesota Rail*road* Company, the grantee of the state, the builder of

the road, the corporation for whose use or benefit this tract of land was certified.

It was not made upon the Southern Minnesota Railway Company, the only other railway company which ever had or claimed title to, or interest in, this tract of land.

If made, it was made only upon a railway company which *never had or claimed title, or appearance of title;* upon a company upon which no duty of reconveyance *could be* imposed; and this, *more than a year after* the Southern Minnesota Railway Company, the apparent owner of record, had conveyed to Erichsrud by a deed *placed upon public record ten months before the date of such supposed demand;* and, as already noted, the making and record of this deed is alleged BY THE BILL ITSELF.

A demand upon the Chicago, Milwaukee and St. Paul Railway Company was no more efficacious, no more a compliance with the act of 1887, had no more tendency to accomplish the purpose of Congress in requiring a demand, than would have been a demand made upon the Kamschatka Fur Company, or any other stranger to the land demanded.

If the act is possibly construable as, under the facts shown, authorizing a demand upon the Southern Minnesota Railway Company *as once claimant of title* and as grantor of record to Erichsrud, *no demand upon that company is pretended.*

No demand having been made upon any railway company or other person who had ever sustained any title relation to this land, the ninety days allowed by

the act between demand and suit *has never begun to run;* and without allowance of its intended opportunity to make amends by relinquishment or reconveyance, the secretary had no right *under this act* to order, or the Attorney General to institute, this suit.

IV.

WITHDRAWAL.

A leading question of the case concerns the efficacy of the withdrawal alleged by the Bill to preclude any entry of the tract in suit by Donovan.

This involves the "First" error complained of to the Court of Appeals.

It was a grievance of Appellant that "there is no "claim in the pleadings or in the evidence that the "withdrawal stood at all in the way of acquiring title "to the land under the Homestead or pre-emption "laws."

The Bill itself furnishing in an amendment (Record, 10), the fact, date and extent of the withdrawal, *no evidence thereof was needed,* and the answers had no need to include brief or argument upon a fact tendered by Complainant and not denied by defendants.

Counsel contended below that this allegation was *not intended* to extend the withdrawal to anything more than the granted or place lands, and was *not intended* to convey the idea of a withdrawal of indemnity land.

What Special Assistant Attorney Evans thus "intended" in 1894 must now be inferred from the allega-

tion itself, and from its relation to the subject-matter and object of the Bill.

The BILL RELATES SOLELY TO A SINGLE PARCEL OF INDEMNITY LAND.

(2) Counsel next contended that the withdrawal was unauthorized and void, because made *before* the designation of the route.

The two Land Department decisions (considered *infra*), which have been heretofore cited to this point, fail to support it, and are inapplicable to the terms of our granting act.

In *Atlantic & Pacific R. R. Co.*, 6 L. D., 84 (August, 1887), the granting act omitted to provide affirmatively for any withdrawal of indemnity land, and Secretary Lamar's conviction was strong that that act *prohibited* the withdrawal of any land outside of Place Limits. Such withdrawal having however been made, its revocation was sought.

Secretary Lamar held that the withdrawal having been made *only* under the general discretionary authority of the Secretary, was revocable by the same authority, and that the railroad having failed to keep its contract in commencing and completing its road, should not be heard to object.

That case involved no question of the efficacy of the withdrawal *before* revocation.

In *Northern Pacific R. R. Co.* v. *Davis*, 19 L. D., 87 (July, 1894), which concerned Indemnity land, the granting act provided for withdrawal on the filing of a map of general route; but in so doing not only directly

limited withdrawal to Place land, but by implication *forbade* withdrawal of Indemnity land.

Neither of these cases turned upon the date of withdrawal or upon the relation of that date to the date of Definite Location. The deciding reason of each was that the withdrawal under consideration was of land *any withdrawal of which Congress had forbidden.*

On the other hand, as Secretary Lamar mentioned in the Military Reservation case in 6 L. D., at page 18:

"It is true that the Executive, for the purpose of "carrying out the will of Congress as expressed in "legislation, *may* put lands in reservation *without spe-"cial authority*, and equally true that lands so re-"served, and for such purpose, are not subject to dis-"posal under the general laws, *although the reserva-"tion was not contemplated by law.*"

And this view is well supported by *Wolsey* v. *Chapman*, 101 U. S., from pages 768-9 of which the Secretary quotes as follows:

"The proper executive department of the govern-"ment had determined that, because of doubts about "the extent and operation of that act (granting lands "to Iowa to aid in the improvement of the Des Moines "River, 9 Stat., 77), nothing should be done to impair "the rights of the State above Racoon Fork until the "differences were settled, either by Congress or judi-"cial decision. For that purpose an authoritative "order was issued, directing the local land officers to "withhold all the disputed lands from sale. *This with-"drew the lands from private entry*, and, as we held in "*Riley* v. *Wells*, was sufficient to defeat a settlement "for the purpose of preemption *while the order was in*

"*force*, notwithstanding it was afterwards found that "the law, by reason of which this action was taken, "*did not contemplate such a withdrawal.*"

Wood v. *Beach*, 156 U. S., 548, quotes the same passage, adding, "This has been and is the settled rule of "the courts and the Land Department. * * * The "fact that the withdrawals were made by order of the "Interior Department, and not by proclamation of the "President, is immaterial."

The reasons why such act of the Secretary is in law the act of the President are fully set out in *Wolsey* v. *Chapman*, at page 770, and adopted in *Wood* v. *Beach*, at page 550.

Upon page 18 of 6 L. D., reference is also made by the Secretary to the opinion of the Attorney General of July 16, 1878 (6 Op., 80), where it was held, "that "a withdrawal made by the Secretary of the Interior "for the benefit of the Southern Pacific Railroad Com- "pany upon a line *which at the time it had no au- "thority to adopt* put the lands in reservation so that "*no legal rights therein could be acquired under the "general land laws.*"

It thus abundantly appears that the President, or the Secretary as his organ, may at discretion and without special statutory direction, withdraw from market lands the sale or other loss of which would impoverish or impair, perhaps defeat, a grant or reservation for a public purpose or for an enterprise of public importance; and that such withdrawal *while unrevoked* is effectual even when based upon mistake of law or of fact; and we find no instance in which a withdrawal has been held *void*, except where the particular grant-

ing act expressly or impliedly *forbade* general withdrawal or withdrawal beyond defined limits.

The withdrawal of the Southern Minnesota Railroad grant by the Secretary, at his discretion, in advance of the definite location, was, under the foregoing authorities, *neither premature nor ineffectual.*

If by reason of our grant and to protect and subserve its purposes, it was *within the power* of the Secretary to withdraw, independently of direction by the act itself, the provision of the act making it his "duty" to withdraw *upon the filing* of route maps, was not an enabling provision, not a grant of power, but, in line with the right reason for every proper withdrawal, was a command not to *defer* the protection of a withdrawal *longer* than the filing of such maps. If so, instead of a diminution of protection to the grant, it was an added emphasis upon the importance of *early* protection.

In our case the withdrawal was ordered August 23, 1866, and received at the District Land Office September 10, 1866. (Gov't Exhibit B; Record 118.)

Like the Congressional grant itself, the withdrawal became *definite as to parcels* on February 25, 1867, when the Definite Location became effective. (Stipulated Fact III, Record 113.)

That the withdrawal order was made and filed in the Local Land Office before the Definite Location, cuts no figure here, *because* Donovan's claims did not originate between August 23 or September 10, 1866, and February 25, 1867. Had the same order been made at the latter date, its effect upon an entry attempted

in June, 1868, would have been the same; and the order, one of discretion until February 25, 1867, became on that day one of strict statutory direction, effective until revoked—and of its revocation there is neither proof nor allegation.

According to the Bill (Record 10), the order withdrew, (not the lands "hereby granted," or Place lands alone, but) "the lands *embraced within the provisions* "of said act," and Section 5 of said act required the Secretary to "withdraw from market *the lands em-* "*braced within the provisions* of this act."

The "provisions of this act" necessarily embraced Indemnity lands, for the right of the beneficiary to them *had no other origin;* and the act, in providing for but one withdrawal, without distinction as between place lands and indemnity lands, itself justified withdrawal of both classes *at the same time*—and this construction, as we shall observe later, is in exact accordance with the long established understanding and practice of the Land Department in relation to all Minnesota railroad grants.

Appellant's third sub-point under this Assignment was that the withdrawal, if not void, did not withdraw the tract in suit, because it was then still subject to and excepted by the Barkley entry.

Was it so excepted?

Yielding to Secretary Noble credit for all sincerity in his conception of the uniformity of the rulings of the Land Department quoted by counsel from the Iverson case (14 L. D., 79-80), and yielding like credit to the opinions of the Commissioner and of the Secretary

as to the land here in suit (quoted in our Record), and admitting that some rulings of the Land Department had been made as stated by Secretary Noble, we must say that neither of those gentlemen then acted as a *lawmaker* or as a *final judge;* and

(1), that if any such ruling was required or justified by the Statute under which it was in the particular instance, promulgated, our granting act neither requires nor justifies any such exception. The sole exception of land from the operation of our act on account of the attachment of settlers' entries, is *solely of land in place limits, of land for which a substitute was to be sought in indemnity limits.*

The final proviso of Section 1 of the act is of land reserved *to* the United States itself for Distinctively National uses, and that reservation can mean neither more nor less than was meant by "reserved *by* the "United States for any purpose whatever"; which is contradistinguished in the earlier part of the Section, from sale and from attached settlers' rights; and Appellant's concession that upon cancellation of the Barkley entry this tract became selectable as an Indemnity tract, is an abundant concession that our distinction between the exceptions of this act is correct;

(2), that *unless clearly necessitated by statute,* no such ruling has any rational foundation. The exception of Place Lands on account of settlers' rights was designed to save rights of settlers who might be upon such lands in advance of any right of the beneficiary—settlers usually thereon before the passage of the granting act.

But no such reason can apply to the inclusion in a

withdrawal from general market of a possible indemnity tract already subject to a settler's entry. Such inclusion would hurt no such settler, but would, in fact, afford him additional protection, by insuring him against claim-jumpers, and from any competitive attempt of any buyer or other settler. A withdrawal in aid of a railroad, without prejudice to the earlier settler, necessarily subject to his rights, if any, of any given tract of land within Indemnity Limits, limits created by the granting act upon the presumption, always well founded, that lands within the place limits only will prove insufficient to fulfill the inducement tendered by the granting act, is no hardship and no injustice to any citizen who has as yet *attempted no settlement, invested no labor, no money, no hope*, in *the particular tract;* works upon the citizen *not yet a settler* no differently from a withdrawal or reservation of public land for any other of the numerous purposes for which withdrawals and reservations are made. And so long as a beneficiary proceeds with reasonable diligence and good faith in fulfillment of his contract with the Government, *he ought to be protected against depletion of the fund upon which the granting act has invited him to rely;*

(3), we insist that the Department holding relied upon by Appellant is inconsistent with the long established railroad land grant practice of the Department in related and more important particulars. For, it is published to the world under authority of the United States in the *Winona & St. Peter case*, 165 U. S., 463, 465, 473, and is thus and otherwise abundantly matter of judicial knowledge without formal proof (though

formally proved at pp. 186-7 of the Record), that until the *Dunmeyer decision*, 113 U. S., 629, March 2, 1885, a homestead entry abandoned before the right of the road attached was held not to except the land from the grant—that a pre-emption claim abandoned after attachment of railroad grant did not defeat the grant, but upon failure of the claim the land would inure to the grant as of the date when the grant became effective; that the rights under the grant attached to the lands in granted and indemnity limits *as of the same date;* that selection was not deemed necessary to attach the grant to any specific tract within indemnity limits; that the lands within the indemnity limits were *withdrawn at the same time* as those within the primary or granted limits; and that in accordance with these rules (among others stated therewith), the grants to and for *each and all of the land grant railroad companies in the State of Minnesota were before, at, and for a long time after the certification of the lands* (there) *in question, administered.*

At page 464 of 165 U. S., it appears that all but two of the parcels there in question were certified in 1872, 1873, 1874 and 1875, and those two in 1879.

The tract here in suit was certified March 25, 1871, after selection November 29, 1870; and

(4), whatever may have been the uniformity of the alleged ruling after 1868, Appellant's evidence in this case demonstrates that before the Commissioner's letter of February 14, 1889 (Record 119), the tract here in suit was not regarded by the Land Department as excepted from the withdrawal; for Register Bullis, with all his manifest anxiety (*shall we call it remorse-*

ful, or COLLUSIVE?) to make a case for Donovan, testifies (Record 49-50), that *when Donovan applied* to enter the two tracts "he was informed that *we were* "*instructed* not to allow any entries on odd numbered "sections within a certain distance of the railroad"—(evidently referring to indemnity limits)—was told (Record 50) "he could not enter that tract (in Section "35), because it *belonged* to the railroad company;" Donovan's testimony (Record 66, foot) is to the same effect.

Official refusal to allow entry of land in indemnity limits not yet selected by the railroad company could have proceeded upon no theory except that of *a withdrawal in force;* and the view and statement of Register Bullis that this tract was already "railroad land" could, under then existing facts, have had no foundation but *specific instructions* from Washington, founded upon the settled rules and practice of the Department already quoted from 165 U. S.; and from those rules it logically follows that if upon cancellation of Barkley's entry this tract of land inured to the grant without discrimination as between place lands and indemnity lands, it necessarily inured to the *body of lands withdrawn*, fell within the terms of the withdrawal order; this because it was "*embraced within* "*the provisions*" of the act, and because, as pleaded by the Bill, the order accurately followed the statute; because (in reverse order of the rules quoted) indemnity lands were withdrawn *at the same time* as place lands, and need not be selected; and because rights under the grant attached to granted and indemnity limits at the same date.

And *the instruction* to which Bullis referred, as a reason for disallowing entry of the 80 in question, was then, *in itself, a subsisting withdrawal of this tract* among others likewise located.

V.

DONOVAN'S ATTEMPTED ENTRY.

We insist that if, either under the established departmental construction of that generation or under proper interpretation of our granting act, this tract, upon cancellation of Barkley's entry, January 14, 1868, inured to the grant, and so fell within the operation of the general withdrawal, *it remained withdrawn* five months later when Donovan attempted entry, and until its certification ended *as to it* the office of a withdrawal; nay more, that if the instruction not to permit entries within indemnity limits, of which Bullis told Donovan as reason for not allowing entry of this 80, was not made before January 14, 1868, when the Barkley entry was cancelled, but was made then or thereafter *before* June 6, 1868, that was in itself a good withdrawal; and this latter supposition is probable because Bullis did not reveal this instruction to Donovan until the day when they destroyed the old, *half-finished bluffing application* and wrote up the new one in June, 1868.

Actual withdrawal whenever and however made, if unrevoked when Donovan attempted entry, justified disallowance of his attempt, if disallowed rather than waived, and nullifies all claims and contentions here asserted, whether on the part of the Appellant or on

behalf of Donovan, and would have been fatal to his entry had it been regularly permitted.

After withdrawal, "no title could be initiated or es-"tablished, because the Land Department had no right "to grant it." (End of opinion, per Miller, J.)

Bullard v. *Des Moines, etc.*, 122 U. S., 167.

"After such withdrawal no interest in the lands "granted can be acquired against the rights of the "company, except by special legislative declaration; "nor, indeed, in the absence of its announcement, after "the general route is fixed."

St. P. & P. v. *N. P.*, 139 U. S., 1, 18.

In *Wood* v. *Beach*, 156 U. S., 548, one of the granting acts involved (p. 551), enacted:

"That as soon as said company shall file with the "Secretary of the Interior maps of its line, designating "the route thereof, it shall be the duty of said Secre-"tary to withdraw from the market *the land granted* "by this act in such manner as may be best calculated "to effect the purposes of this act and subserve the "public interest."

This act passed twenty-two days after ours.

It *directed* withdrawal, *not* of all the lands *embraced*, etc., but of the lands *granted*, *i. e.*, as ordinarily understood, *place lands*.

The map of definite location was filed December 6, 1866. Separate orders of withdrawal as to two different companies were made in the following March and April, and respectively received at local land office in April and May, 1867.

C. B. Wood, husband of plaintiff in error, settled upon and attempted entry of a tract of *indemnity land* June 8, 1870. The railway company selected the tract August 8, 1872. Selection was "approved April 10, 1872," (doubtless 1873), and the state conveyed May 9, 1873.

The Supreme Court, speaking by Justice Brewer, first remarked (549, foot):

"If these withdrawals were valid, *no rights, legal or "equitable*, were acquired by his (Wood's) occupation "and settlement."

Referring to *Wolsey* v. *Chapman*, 101 U. S., 755, 768, and after mentioning the need of a withdrawal, as required, *not by statute*, but by circumstances, Justice Brewer (p. 550), quotes:

"For that purpose an authoritative order was is- "sued directing the local land officers to withhold all "the disputed lands *from sale. This withdrew the "lands from private entry*, and, as we held in *Riley* v. "*Wells, was sufficient to defeat* a settlement for the "purpose of pre-emption *while the order was in force*, "*notwithstanding* it was afterwards found that *the "law*, by reason of which this action was taken, *did not "contemplate* such a withdrawal."

We subjoin the last paragraph of this opinion, substituting Donovan's name for Wood's:

"Upon these admitted facts, it is clear that Mr. "Donovan acquired no equitable rights by his occupa- "tion and settlement. He went upon lands which were "not open to homestead or pre-emption entry, and can- "not make his unauthorized occupation the foundation "of an equitable title. He was not acting in ignorance

"but was fully informed both as to the fact and the "law. He deliberately took the chances of the railway "company's grant being satisfied out of lands within "the place limits, or by selections of lands within the "indemnity limits other than his, and trusted that in "such event this tract would be restored to the public "domain, and he gain some advantage by reason of "being already on the land. But the event he hoped "for never happened. The party for whose benefit "the withdrawal was made complied with all the condi- "tions of title and took the land."

Like reasons governed in *U. S.* v. *Holmes*, 105 Fed., 41, 45, 46.

Any withdrawal, then, made before June 6, 1868, and then unrevoked, precluded Donovan's attempted entry however completely he may then or afterwards have complied with all formal particulars of statutory requirement; and his attempt *initiated no right* in him. For the same reason his appropriation of Barkley's abandoned logs and his breaking up in the latter part of 1868, and before November, 1870, of a few acres additional to Barkley's earlier breaking, upon a tract of uninclosed land without a building and separated from his house 80 by a public road, invested him with no right, and therefore could not operate as notice of any right to the land; was but an average illustration of squatter practice. No inquiry of Donovan or of any one else before the railroad selection, could have ascertained a right in him *which had no existence as a right.*

Should we be reminded (as heretofore) that the answer of the railway companies admits, among other things, that the land was subject to homestead entry

by the first legal applicant after the cancellation of the Barkley entry, we would say, first, that because, as the law was then construed, practiced and suffered to appear, this land was then *actually withdrawn*, or, *if the withdrawal of this tract*, or of disengaged indemnity lands generally, was made *at or after the time* of the Barkley cancellation, by means of the Washington instructions of which Bullis told Donovan, Donovan was, in neither case, a *legal* applicant; and, second, that an erroneous admission by pleading *in matter of law*, CANNOT ALTER THE ACTUAL LAW, however a mistaken admission might bind the pleader as concerning a strict evidentiary fact.

VI.

DONOVAN'S ALLEGED FULFILMENT AND VESTED RIGHT.

The "Second" error attributed to both courts below, involves Appellant's combined contentions to the effect that Donovan was entitled to enter the 80 in suit, attempted to do so, was rejected, nevertheless paid for it, fulfilled all legal requirements as to occupation and use for five years and upwards, and offered to prove up; and that he thus acquired a perfect ironclad vested right.

As to what took place thirty-four or thirty-five years ago between Donovan and Bullis in the latter's office, we are at the mercy of so much of their collusive testimony as the court may believe.

What no one else saw or heard is uncontradictable except by probabilities, and *improbability is a strong opposing witness.*

Donovan is interested and wily. If their united testimony is true, and it was not fully and fairly understood between them that Donovan willingly waived the 80 in suit, Bullis is convicted by this record of disobedience to Section 2295 U. S. R. S., which was and is:

"The Register of the land office shall note all appli-
"cations under the provisions of this chapter on the
"tract-books and plats of his office, and keep a register
"of all such entries, and make return thereof to the
"General Land Office, together with the proof
"upon which they have been founded,"

in omitting to "note" Donovan's application for the 80 in question, in omitting to keep a register of it as an entry, and in omitting to make return thereof to the General Land Office; and he is likewise convicted of embezzling whatever Donovan paid to him for this 80; and is likewise convicted of thus doubly violating his official oath.

And by the testimony of such worthies, the United States of America, as Protector, as a Parent, even here persists in effort to strip defendant Woodwick of his $2,000 property, and turn him back upon the warranty of four women, and the warranty, to the extent of $480 and interest, of the Southern Minnesota Railway Company. Of course Donovan's trespasses upon the land *before* the Barkley cancellation can count for nothing.

We do not believe that Donovan ever paid or offered a penny on account of this eighty.

Donovan says (Record 65) that he paid Bullis $15 *after the trial* was over, *i. e.*, in August, 1867; he does not say for what. He does not, by any official or other

receipt corroborate himself or override Bullis' statement, which will be shortly mentioned. If Donovan so "paid" in 1867, he paid to an officer who had then *no official right to receive* on account of land still subject to Barkley's entry, and it was then no payment, but a *personal* deposit.

In answer to the vigorous and enticing leading question (Record 49, above middle), "As soon as Barkley's "entry was cancelled, *and you made his* (Donovan's) "*entry on the books* of the application for the land, "did he pay *for the land* and the fees incident at that "time," Bullis replies, "I THINK he did." *Yet* Bullis had not made, had never made, *any entry on the books* of Donovan's application for our 80. (Record 192.)

Bullis says nothing as to the *amount* then supposedly paid him, and says no more than this as to the *date* of such payment. His testimony locates the supposed payment in June, 1868, and thus contradicts any statement that *any payment "for the land* and the fees *had "been made before* June 6, 1868," for we have no evidence that Donovan was at the land office between the trial in August, 1867, and his visit of June 5 or 6, 1868. (Record, 66, 78, 79.)

According to Donovan, he at some time paid $15 *besides* the expenses, $9—for what?—*for what* had Bullis an *official right to exact* $15, even in June, 1868?

The Homestead Act exacts no price for land entered under its provisions, unless the $5 and $10 mentioned in Section 2291 are prices, and not "*fees*"; and besides $5 in respect to an 80 or $10 in respect to more than one 80, we discover nothing payable by a homestead

entryman, at the time of entry, except (under the third subdivision of section 2238), a commission of 1 per cent. on the *cash price fixed by law*, of the land applied for—which commission, as to land outside of place limits, would be $1 per 80.

For homestead entry of both eighties, Bullis could thus ask only $10 plus $2 commission. Why then should $3 more be added, and if added, what did it pay for—if $10 was "fees," was the other $3 "the *government price* for said lands"—for 160 acres? Or was it neither price of land nor fees, but a bribe to Bullis, to bear fruit in the future?

We fully believe that Donovan never paid Bullis more than $15 in all; and that this $15 was made up of the $9 for expenses paid in 1867, and of $5 plus $1 commission paid on or about June 6, 1868, solely for the entry of the 80 in Section 26; just what Bullis, then and for that purpose, had a right and duty to receive.

It is for the court to determine whether the slight uses and abuses of the land in suit here appearing to have been made by Donovan in a sparsely settled and unfenced prairie region, between June 6, 1868, and May, 1875, could, under all circumstances in proof, have been sufficient to entitle Donovan to a Patent had his attempted entry been originally allowed.

He made no improvement of consequence. In an 80-acre tract, of the 65 acres under cultivation in 1901 (Record, 166), Donovan claims to have broken a few acres in 1868, about 12 acres more in 1871—between 18 and 20 acres in all (Record 90-91)— the last of it in 1871 (Record 166). Except cultivation of these ploughings Donovan's uses of the land consisted only

of the browsing of his cattle in the open country, and his partial care and use of a ditch beginning during Thompson's occupation, for drainage of his home 80 and of the land in question, a ditch unquestionably dug or maintained only by Thompson's permission, if not partly for his benefit and so inducing his permission.

Without aid of such testimony as that of Silliman (Record 149-150) as to the local practice of settlers in breaking, farming and otherwise using adjoining vacant lands not their own, it is said in *Tarpey* v. *Madsen*, 178 U. S., at p. 221:

"It is a matter of common knowledge that many go "onto the public domain, build cabins and establish "themselves, temporarily at least, as occupants, but "having in view simply prospecting for minerals, "hunting, trapping, etc., and with no thought of ac- "quiring title to land."

With less elegance, the court might to the same effect have said: "We understand the methods of squat- "ters;" and it is a very practical question whether until about May, 1875, Donovan *thought himself*, as to this land, anything but a squatter.

As to actual possession after June 6, 1868, and until Thompson came on in 1885, we can admit that no one but Donovan was in any possession or cultivation of said tract; that in 1885, Thompson *ordered* him off, and that thereafter until the decision of Donovan's suit against Thompson early in 1888, Donovan alone made any actual use of the uncultivated portions of the tract; portions for the wild grass upon which Thompson seemed not for the time to care—so that

Donovan's cattle *at large* browsed over them as over *any other* convenient *uninclosed* land not in actual use.

As an appeal to judicial compassion, Appellant's previous briefs have industriously asserted that Thompson *"forcibly"* expelled Donovan.

The Record contains no extenuation for such assertion.

Coming to Appellant's second contention heretofore under the "Second" Assignment, to the effect that *Donovan's application to enter secured to him the same rights as if his application had been allowed*, we cannot, with reference to the land in question, or to the facts in proof, concur in the proposition itself, or in the applicability of past citations for its support, or in counsel's deductions from them; and on the contrary, those citations are in flat contradiction of cases of high standing to which we will refer.

Shepley v. *Cowan*, 91 U. S., 330, 338, is in our favor. In June, 1868, the reservation of *our* indemnity belt by withdrawal order *had not "then ceased,"* but was in full force, and Donovan *was informed* that the 80 in question was railroad land, and *therefore* not subject to entry.

Ard v. *Brandon*, and *Ard* v. *Pratt*, 156 U. S., 537, do not apply for two obvious reasons:

First, because those suits were between private individuals. In suits involving these same lands (p. 540) it had been held in 118 U. S., 682, and 141 U. S., 358, that the United States had *no cause of action* against the railway company *or its grantees* to disturb the legal titles conveyed to one company by pat-

ent, to the other by certification; although Justice Harlan had said in the latter case (p. 379):

"If the facts are as thus alleged, it is clear that the "Missouri-Kansas Company holds patents to land "both within the place and indemnity limits of the "Leavenworth road which equitably belong to *bona* "*fide* settlers who acquired rights under the homestead "and pre-emption laws, which were not lost by reason "of the Land Department having by mistake or an "erroneous interpretation of the statutes in question "caused patents to be issued to the company."

The Ard cases are inapplicable, secondly, because, when Ard sought to file his entry July 14, 1866, he had already settled upon the land; the land was within indemnity limits, but *no order of withdrawal* was made until March 19, 1867. Because, when he sought to enter, the land *had not been withdrawn*, he had a clear right of entry, and the only reason given for *his* rejection was a *false* one, viz.: that the land was in place limits, although it was not.

Weeks v. *Bridgeman*, 159 U. S., 541, applies to no such situation as Donovan's.

Brott, in possession, with constructed mail stations used in his federal employment as a mail carrier, applied to pre-empt *what later became* place land; he did so over four months before the definite location. His right, begun by settlement when the land was absolutely free and public, retained by use, was in full effect, opposed by no rival claim or right, when he applied to enter. No withdrawal stood in his way. No definite location had yet been made. Of course his right to enter was clear and the whole reason for this

decision is the holding of the court that Brott never forfeited his right of acquisition though he consummated his pre-emption by adventitious aid of a special act of Congress, which was in effect, simply a *Command of Congress* to allow his original application.

Here Donovan did not attempt entry before definite location, but did so only *after withdrawal,* and when, *because* of the withdrawal, he had *no right* of entry.

Tarpey v. *Madsen*, 178 U. S., 215, will be hereafter sufficiently distinguished.

From *N. P. R.* v. *Amacker*, 175 U. S., 564, and from page 567, heretofore specially cited by Appellant in proof of the so touching tenderness of the law for one who in *good faith* goes upon the *public* lands with a view of *making a home* thereon, may we quote the lower four lines:

"Yet this would never justify an ignoring of the "clear rights of the company; for the purpose of Con- "gress in the grant must be recognized and made "effective in every case to which the grant applies."

Donovan did not go upon our 80 "*in good faith,*" but, like Wood in *Wood* v. *Beach*, like Madsen in *Tarpey* v. *Madsen, as an experimenter in bluffing;* actually, as we insist, unaccompanied by any fair semblance of compliance with the law, *under pretence of advice* from a petty land officer, who, as we are asked to believe, foresaw in 1868, conclusions never dreamed of by any of the long procession of his superiors in the Interior Department, and reached by the Supreme Court only in 1885.

But if any citation of Appellant can possibly apply

to our facts, how shall it be reconciled with the *Dunmeyer* case, the *Whitney* case, even with the *Tarpey* case?

In the *Dunmeyer* case, the tract in question was place land, upon which one Miller had filed a homestead claim before definite location of the railroad, which he afterwards abandoned.

One question there was, *what sort, form or proceeding,* by way of entry, will *so* bind and hold land *as to except it from a railroad grant?* On page 644, Justice Miller, uttering a unanimous opinion, said that Miller's claim was made and *filed* in the land office, and *there recognized* before the line of the road was located; that Miller's claim was an existing one *of public record* in favor of Miller *when* the railroad map was filed; that this homestead claim had "attached"; that "attached" did not mean mere settlement, residence or cultivation of the land, but it meant a proper proceeding in the proper land office. And it follows from what he had just before said, that by "proper proceeding" he meant a proceeding *entered of record* as required by Sec. 2295.

In the *Whitney* case, 132 U. S., at p. 364, commenting upon an irregular entry actually allowed and *recorded,* the court said:

"So long as it remains a *subsisting entry of record,* "whose legality has been passed upon by the land au- "thorities, and their action remains unreversed, it is "*such* an appropriation of the tract as segregates it "from the public domain, and *therefore* precludes it "from subsequent grants."

In the *Tarpey* case, 178 U. S., 215, one Olney had on

May 29, 1869, attempted pre-emption, alleging settlement on April 23, 1869, which was later than October 20, 1868, the date of the definite location of the railroad. Nothing more was ever heard of Olney.

In June, 1896, Madsen filed a homestead entry, alleging his own settlement and occupation since 1888.

Madsen attempted to *avoid* the railroad title by oral proof that Olney *actually began* his settlement *before* the definite location of October 20, 1868. Madsen was not allowed to go behind the date of Olney's settlement as *Olney had caused it to be put upon record.* And concerning the efficacy of Olney's settlement to defeat the railroad title, the court (at p. 219), by Justice Brewer, said:

"That there was *nothing of record* affecting the "validity of that title, is conceded. No one, by an *in-*"*vestigation of any public record, could* have ascer-"tained *at that time* (October 20, 1868) that there was "any doubt in respect thereto."

This *Tarpey* case has been cited for Appellant to extol and exemplify the melting tenderness for settlers, which Olney, the original entryman, did not merit or ask, which the court refused to the *interloper,* although he had *successfully operated as a squatter* for eight years.

In the *Tarpey* decision let us observe its commentary, at page 223. After there mentioning that the *Van Wyck* and *Dunmeyer* cases settled the date of filing map of definite location as the inception of railroad title, it was said:

"*This eliminated all oral testimony,* and established

"a date at which *by record*, the title of the railroad "company could be considered as definitely ascer- "tained. In the latter of the two cases (*Dunmeyer*), "the same elimination of *oral* testimony, the same ref- "erence to the *record* as determining all opposing "rights of the individual entryman, was also de- "clared."

Further quotation is there made from page 640 of the *Dunmeyer* case, with reference to the ascertainment, at or after the filing of the map of the lands excepted from grant; thus: "For *by examining the plats* "of this land in the *office of the register and receiver*, "*or in the general land office*, it could readily have "been seen if any of the odd sections had been "sold * * * or a homestead or pre-emption claim "had 'attached' to any of them."

And in the *Winona & St. Peter case*, 165 U. S., 463, Justice Brewer, in stating the case (p. 464), recites that no former entryman "had ever made any claim "to the lands, so far as shown *by the records* of the "land department."

Can the records of the Land Department and their purpose be further magnified, their value be more emphatically illustrated; license, *if not command* to rely upon *them* be more pronounced?

If there *ought to have been* a record of Donovan's mythical application to enter our 80, the want of such record to serve as a warning to the railroad company and to its grantees, is *wholly the fault of the United States and its officers.*

Can it be that while R. R. beneficiaries of Land

grants are to be bound and limited by Government Records, they are to be *denied all benefit* of the same Records?—that such Records are good *only to protect claimants adverse to such beneficiaries?*

This court is asked to override the righteous intuitions of the Courts below and to adjudge, to the injury of Woodwick, and, back of him, of the Erichsrud family, and, back of them, of the Southern Minnesota Railway Company, upon the feeble guessing, under strong and skilled leadership, of the evidently failing, if not broken down man and self convicting criminal *whose alleged neglect of duty* has given rise to this controversy, and upon the testimony, interested, artful, in some respects improbable, and in all respects which refer to the unseen and unheard doings in Bullis' office, *uncontradictable*, of the man for whose sake the United States, without gain to itself, is willing and striving to do a great wrong to its more meritorious citizens, in the name of "Equity."

Therefore, denying that Donovan ever had a right of entry, or that before the certification, or in connection with proving up on his house 80 in 1875, or at any time before the act of 1887, or ever as against the efficacy of our selection and certification, Donovan so complied with the law as to become entitled to a certificate or patent, we deny the pertinency of Appellant's contention that he acquired a vested right in the premises, and deny the pertinency of any authorities thereunder heretofore cited to the *Appellant's case as made.*

On the contrary, because, as we contend, he never paid, in respect to the land in suit, the $5 required by

Section 2290; because he never, before proving up in 1875, did anything with or upon the land itself, which any other squatter would not have done; because it does not appear that his offer of proof as concerning our 80 would or ought to have been accepted as sufficient; and because, as we shall later contend, under all common criteria of human motive and purpose, Donovan thoroughly waived and abandoned his pretended entry, except when at long intervals, his covetousness casually reasserted sway, we insist that he never acquired, as against our state, or its grantee or assigns, any approach to a vested right; and that his plight falls outside the protection of the *Gonzales*, *Newkirk* and *Hawley* cases, and under the opinion of Brewer as Circuit Justice in *Norton* v. *Evans*, 82 Fed., 804, which was a case of attempted homestead entry *rejected*.

That opinion was supported by five Supreme Court decisions, refused to apply *Ard* v. *Brandon*, 156 U. S., and was followed by our Circuit Court of Appeals in *Wagstaff* v. *Collins*, 97 Fed., 3.

In *Norton* v. *Evans*, it was ruled that even an *allowed entry* would have *created no vested right*, and did not interfere with the power of Congress by *subsequent legislation* to dispose of the land.

VII.

SELECTION AND CERTIFICATION.

We come now to consider the validity of the Selection and Certification; involving Appellant's assign-

ment of error to both courts below; under which it is asserted that the certification was *void*, and that for *that* reason there *can be*, under it, *no bona fide* purchaser.

We contend that the cancellation of the Barkley entry in January, 1868, immediately made this 80 selectable by the railroad company, made it (if not such before) a tract of "the *lands embraced within the provisions* of this act", and that all such lands had not only *become withdrawable* in accordance with the command of the act, but that they had, before June 6, 1868, been withdrawn in form and in fact, either by the original order of 1866, or by the instructions of which Bullis testified.

And this conclusion, co-incident with the habitual opinion and habitual practice of the Land Department, results from the terms and requirements of the granting act itself, and is in harmony with the views of this Court in the *Winona & St. Peter case*, 67 Fed., syllabi 11-13, p. 949, and pp. 967-8.

Referring to our earlier citations of the *Dunmeyer, Whitney and Tarpey cases*, as to the utility and efficiency of the public land records, the right to rely upon them, no less than the duty to consult them, and to the proof that *no record* of Donovan's alleged attempt was ever, before the certification, any where made; we submit that the selection was justified and should be protected by the principle of *Ryan* v. *Ry Co.*, 99 U. S., 382, 388.

There indemnity land freed and made selectable by the cancellation *of record* of a former claim, was held to be effectually selected, *because when selected* it was

free from any adverse claim *of record*. And that our 80 was when selected, thus free, appears in the Record at top of p. 192.

The *Ryan case* was, among others, applied by our Circuit Court of Appeals in the *Winona & St. Peter case*, in 67 Fed., at p. 968.

Let us remember, in the light of the beginning-to-be conscientious remedial legislation of 1887 and 1896 already referred to, that in an EQUITY ACTION in which the United States is suitor, we are considering, not what in 1885 the Dunmeyer case *discovered* the law to be, but what from a date long prior to 1866 and until the Dunmeyer decision, the United States, its Land Department, its Courts, and its Congress supposed, or made the law to *seem to be*, led the world *to believe it to be*. As matter of fact, *was not such*, through all that period, actually "*the law of the land*," amply justifying, even enjoining, reliance of the people upon it *as law*.

In 1878, in *United States* v. *Burlington, &c., R. R. Co.*, 98 U. S., at p. 341, the unanimous court, under similar considerations, said:

"Such has been the *uniform* construction given to "the acts by *all* departments of the government. Pat- "ents have been issued, bonds given, mortgages exe- "cuted, and legislation had upon this construction. "*This uniform action is as potential, and as conclusive* "*of the soundness of the construction, as if it had been* "*declared by judicial decision.* It cannot at this day "be called in question."

Can it be reasonably said, that the railroad company in selecting this tract November 29, 1870, or the Sec-

retary in certifying it in March, 1871, was not justified in relying upon, in acting in accordance with, rules so long and so universally applied? The land had become clear of Barkley's entry by his abandonment (proved by Donovan, incidentally to a contest including the other 80), and by its consequent cancellation.

We venture to urge, that neither the Land Department nor the Courts should disturb an adjustment made in accordance with a uniform construction which prevailed *at the time*. Such construction by the officers of the government entrusted with the execution of the law, through a long course of years, should be, and (as already mentioned) has been pronounced as conclusive as a judicial decision.

Various other applications of this principle may be found in

Hahn v. *U. S.*, 107 U. S., 402;
Brown v. *U. S.*, 113 U. S., 568;
U. S. v. *Philbrick*, 120 U. S., 52.

But it is urged that the certification was absolutely *void*, and conveyed no title whatever.

And to this proposition we were in the Court of Appeals and are again here cited quite at length to the decision of that Court in *Burr* v. *Greeley*, 52 Fed. Rep., 926, a case decided upon demurrer to a complaint which alleged a certain patent to be void (an allegation which the demurrer could not dispute), and concerning which the same Court of Appeals in *U. S.* v. *W. & St. P. R. Co.*, 67 Fed., 948, after allusion to erroneous certifications, and citations of this Burr case, said (p. 954):

"But was the decision and judgment of these officers

"void or only voidable? Counsel for the government "insist with great earnestness that the cases just cited "conclusively answer this question and preclude fur- "ther discussion. A careful examination of the opin- "ions, however, has led us to the conclusion that these "cases are not decisive of, and that they are hardly per- "suasive upon, this question. A determination of it "was not necessary to the decision of *either* of the "cases, so that *whatever was said concerning it was* "*obiter dicta.* In *Railway Co.* v. *Dunmeyer* no certifi- "cate or patent had issued to the railroad company, "but a patent had issued to an adverse claimant of "the land. The action was for the breach of a cove- "nant in a deed made by the grantee of the railroad "company, and it was sustained on the ground that the "railroad company never had any title, and the pat- "entee had. In *Burr* v. *Greeley,* a remote grantee un- "der the railroad company, who was in possession of "the land, claiming from the United States the rights "of a *bone fide* purchaser under the act of 1887, "brought an action against his grantor for breach of "covenant, on the ground that the railroad company "never had any title, because pre-emption rights had "attached to the land at the time of the definite loca- "tion of the line of the railroad. This court held "that the plaintiff could not maintain his action *be-* "*cause* he could not *retain the benefits* given to him as "a *bona fide* purchaser from the railroad company or "its grantee, under the act of 1887, and *at the same* "*time* recover for a breach of the covenant in his deed. "In this case patents or patent certificates had been "issued to the state for the railroad company, and it

"is stated in the opinion that these patents were void, "and that purchasers under them acquired no title. "But it is obvious that the decision must have been the "same whether the patents were void or voidable. "*That question was not material to the decision, and* "*what was said upon it was unnecessary to the deter-* "*mination of the case.* * * * The question now "before us was neither argued, considered, nor de- "cided in that case, and we enter upon its considera- "tion in this case for the first time.

"The question is, *were the certificates* of the officers "of the land department *absolutely void*, so that they "conveyed no title, legal or equitable, and so that they "were constantly open to collateral attack?"

On page 960, said Court of Appeals further said of the action of the certifying officers:

"It now appears that they were mistaken as to the "legal effects of these facts, but the question they de- "cided was one which the acts of Congress authorized "and required them to decide—one which they were "obliged to decide before they issued the certificates; "and, although their decision and the conveyances evi- "denced by these certificates may be voidable, *they* "*are not absolutely void.* They are impregnable to "collateral attack, and *they conveyed* the legal title to "the lands to the state and its grantees."

From the foregoing repudiation of *Burr* v. *Greeley* on the point under consideration, Judge Caldwell did not dissent.

Because the tract here in suit was not within the place limits, but was only within indemnity limits, it was *not* excepted from the grant."

The efficacy of certification as well as of a patent to pass legal title, *even in cases where there may be a clear right of cancellation*, was allowed by Justice Brewer in *Ard* v. *Brandon*, 156 U. S., at page 540, where he says, that the "*certification* of the one tract "and the patent of the other operated to *transfer the* "*legal title* to these *two* tracts to the railway com- "pany." At page 538 it appears that both tracts were of *indemnity* lands.

And in the *Winona & St. Peter case*, 165 U. S., 463, (on appeal of the case first cited from 67 Fed.,) and involving land in place limits which had been subject to settlers' entries at the time of definite location (p. 464, middle), and which were therefore *absolutely excepted from the grant*, it was admitted by the Solicitor General (p. 470) that "the legal effect of that certification "was, *as this court has determined, to convey them* "(the lands certified) for the use and benefit of the "Winona Company."

In the same case (p. 477, below middle), the Supreme Court speaks of the efficacy of the act of 1896 "to con- "firm the title which in this case *passed by certifica-* "*tion* to the state."

This last certification was doubtless made under Section 3 of the act of July 13, 1866 (14 Stat., 97), in terms peremptorily applicable to all Minnesota railroad land grants theretofore made; and that the office of such certification *intended by Congress* was to pass title and not merely to inform, is obvious from the ensuing words of the same sentence, that the certified lands "*shall be disposed of by said state, etc.*"

Because lands certainly *excepted from grant* were

involved in the case and decision last mentioned, the inexorable effect of its holding, as to passage of title, is to overrule by necessary implication, whatever previous decision had held not voidable, but "*void*" a patent or certification of land so excepted.

From Appellant's contention, thus inapplicable, as well as erroneous, its counsel has heretofore attempted to deduce the corollary that none of the defendants *can be* a *bona fide* purchaser, because they (meaning, probably, the respective grantors of the respective defendant purchasers), "*never acquired "any title to it.*"

The occult philosophy of this corollary manifestly is that, because the certification *is alleged* to have been, not voidable, but void, no title ever passed from the United States, and, therefore, no grantor assuming to convey had any actual title which his grantee could take.

Such reasoning may under different circumstances, be occasionally true. But a grantor who *has had* title and has conveyed it by a deed not seasonably recorded, who therefore has no actual title left, may, as we familiarly know, nevertheless give perfect title to a later purchaser without knowledge or notice of the earlier conveyance. This effect of our state statute is nothing but an equitable principle, and equity, *as* equity, or instinctive justice, itself exacted and gave birth to the statute.

This effect is permitted, because, by non-record of the earlier deed, the first purchaser has enabled the grantor to *appear* still to have the title. The innocent purchaser gets title from a grantor who actually

had none, but did have a color of title *not yet washed out*.

But the certification was not "void;" it passed the government title, and each successive purchaser of the tract in suit was equitably and legally a purchaser in good faith, because, according to all public records of the land department, of the courts and of the register's office of Faribault County, his own grantor had a regular, clear and complete title, traceable from the United States to the date of his own purchase and *he had no notice to the contrary*.

And the one only secret defect, if any, of title, was owing partly to positive misconduct of Bullis, partly to long established mistaken practice of other and higher officers of the United States, in nowise brought to the notice of any purchaser before his own investment in this land.

A word more under this head. Appellant's briefs hitherto, for some artfully dramatic purpose, have industriously used the expression "excepted from the "grant" *indiscriminately*, both as to place lands and as to indemnity lands, and have insisted that land to which a settler has *laid* claim, whether of record or not of record, *wholly* escapes the *jurisdiction of the Secretary. But to what other jurisdiction does it make its way?* What other officer or Department is thereafter to administer upon it and convey or evidence the title?

Law and good sense are satisfied by holding that after a settler's claim, or any other claim, has attached, the Secretary must so far respect the claim

as valid, as to do nothing to its prejudice; it is for him in the first instance, in case of doubt or dispute, to *pass upon its validity.* It is within his power, and is his duty, to pass upon a claim of a *railroad* company, and whenever the case, in his judgment requires issuance of a conveyance, or of other evidence of *railroad* title, to *issue* such conveyance or evidence; as, for want of any record or other notice of any opposing claim, he did in this instance.

VIII.

WOODWICK'S GOOD FAITH.

Under head of the "Third Error complained of," it was contended below that Woodwick was not a purchaser in good faith, because, as strangely alleged, Donovan was *in possession when Erichsrud got his deed from the Railway Company.* That deed was dated March 20, 1888. The judgment in *Donovan* v. *Thompson* was dated January 4, 1888 (Record 185, 6), and Donovan himself (Record 164) being asked the question, "After the termination of that lawsuit you never went upon that land after that, did you," answered only, "Yes, sir; I went on it to open the "ditch and keep it open;" and to the further question, "*Who* was in possession of the land *then,*" re- "plies *Mr. Thompson was in possession of the land "then.*"

Judge Lochren in his opinion (Record 205) says:

"The serious question is whether the *present holder* "of the title from the railroad company is a *bona fide*

"purchaser, or whether any of his grantors were "such."

Substituting for "*bona fide* purchaser", the "pur- "chaser in good faith," defined and protected by the decision of this Court, it appears to us that this question must be decided in favor of O. C. Erichsrud, his survivors and Woodwick, and that the United States, and with them Donovan, must *therefore* fail in this suit.

It was contended below, that while the matter is immaterial, the omission to file a notice of *lis pendens* in Faribault County before Woodwick's purchase, does not tend to his protection, and that the Minnesota statute relating to the record of such notice does not apply to cases in a Federal court; and in support of the first claim was cited an extract from *Union Trust Company* v. *Southern Navigation Co.*, 130 U. S., 565.

Any citation from that case is inapplicable to our facts. That case shows that one Vose had commenced an action against the Southern Inland Navigation & Improvement Co. and the Trustees of the Internal Improvement Fund of the State of Florida, in order to annul all agreements between those defendants, and to restore to the Internal Improvement Fund all lands conveyed or contracted to be conveyed to the Southern Company. The Southern Company *had* claimed that, except by the *inclusion* of its *name*, it had *never been made a party* to the Vose suit, *because* never served with process. A hearing was had upon this point, and it was decided that the Southern Company *had been served*, and from this decision that

Company took no appeal. Before decree in the Vose suit, the Trustees of the Improvement Fund nevertheless conveyed to the Southern Company; and in the case cited, on page 570, it is declared that the decree of dismissal below "must be affirmed *upon the "ground* that the deed of February 10, 1871, by the "Trustees, etc., to the Southern, &c., Company—un-"der which deed the present plaintiff as mortgagee "of the grantee claims title—was *made in violation "of the injunction* previously issued and served upon "said Trustees in the suit instituted by Vose. * * * "The injunction bound the Trustees, and they and "*all other parties to the suit* WHO WERE BEFORE THE "COURT were concluded by the decree subsequently "rendered", etc.

In support of the general proposition, this case refers to *Murray* v. *Ballou*, 1 Johns. Ch., 566, 567, in which Chancellor Kent laid it down as an established rule, that a *lis pendens duly prosecuted* and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree.

This present suit was begun March 6, 1893, *was not "duly prosecuted"*, but was through successive U. S. attorneyships for Minnesota, pigeon-holed and ignored by the Government *for about eight years*, until the employment of Mr. Gilman as Special Counsel. O. C. Erichsrud was *named* as a defendant, *but never served, he having died some years before.* His widow and heirs, and Woodwick, their grantee, were made additional defendants by supplemental bill filed March 4, 1901. No notice of *lis pendens* having been filed in Faribault County, *the* OMISSION TO FILE IT *was as-*

signed as one reason for asking leave to file the Supplemental Bill.

Before the filing of the Original Bill, O. C. Erichsrud's estate had been administered and assigned to his widow and daughters, and they, *before the filing of the Supplemental Bill,* had conveyed to Woodwick. WOODWICK DID NOT PURCHASE FROM ANY PARTY TO THE SUIT.

While we acknowledge the ancient rule that a purchaser *pendente lite* from a party to a suit was usually held bound by the decree, we find the Lord Chancellor saying, in *Sorrell* v. *Carpenter,* 2 Peere Williams, 482, that "where there is a real and *fair* purchaser, "*without any notice,* it is a very hard case, especially "in a court of equity, to set such purchase aside." He said also, "It was a difficult matter to search the "bills in equity or to be able to get notice of them, "many of such being after filing kept in the Six "Clerks' desk, and though this court will oblige all "to take notice of its *decrees* as much as of judg-"ments, yet there *does not seem to be the same reason* "for obliging people to take notice of *the filing of a* "*bill.*"

Could the Lord Chancellor have more aptly described the Government's injurious concealment of the pendency of this case, at first in the Second Division of our District where it began, and afterwards, until service of the supplemental subpoena (Record, 11), nearly 100 miles further away, in the Third Division?

But further: "*Cessante ratione, Cessat lex.*" A

rule founded upon a *public policy of necessity*, in the absence of any law providing for special record notice of the pendency of a suit concerning land, should have no place, no effect in any court held in Minnesota or in relation to real property in Minnesota, or in any other state where a statute providing for record notice among land titles has been long in force.

Since 1869 the law of Minnesota has provided as follows: (Sec. 5866, Minn. Stats. of 1894.)

"In all actions heretofore or hereafter commenced "in which the title to or any lien upon or interest "in real property shall be affected, involved or "brought in question by either party, any party to "such action may at the commencement or at any time "during the pendency thereof file for record in the "office of the register of deeds of each county in which "the real property so affected, involved or brought "in question, or some part thereof, is situated, a no- "tice of the pendency of the action, containing the "names of the parties, the object of the action, and "the description of the real property, in the county "affected, involved or brought in question thereby. "* * * and the register of deeds shall record all "such notices in the same book and in the same man- "ner as mortgages are recorded. *From the time of "filing such notice, and from such time only*, the pend- "ency of the action shall be notice to purchasers and "incumbrancers of the rights and equities of the party "filing such notice, to the real property in such no- "tice described."

And as concerning the filing of such notice by plaintiffs, such, with insignificant verbal changes, has been

the law of Minnesota since 1861; and under it the State Supreme Court, in 1878, in *Jorgenson* v. *M. & St. L. Ry. Co.*, 25 Minn., 206, held, that *since the passage of this provision* one purchasing real estate in litigation from one of the parties thereto *pendite lite, is not chargeable* with notice of the proceedings or bound by the judgment, *unless* notice of *lis pendens* was filed *as provided by such statute.*

The Federal courts take judicial notice of the General Laws of States, and administer and enforce them if not in conflict with National Constitution or Acts of Congress; and thus especially in relation to *land titles.*

If a state court *construction* of a state statute affecting real property is such an important rule of property, that the Federal courts will conform to such construction, even if in their judgment wrong, *because* a different construction would unsettle titles, equally, if not much more, should a State statute whose efficacy to set aside the ancient rule has been for twenty-four years upheld by the State court, be also respected and applied by the Federal courts as an imperative rule of property which the latter will not violate.

We therefore insist that the United States itself, as complainant in this suit, was at its commencement, and *until after* Woodwick's purchase continued to be, guilty of such laches as alone ought to preclude its recovery of this land from Woodwick. And this, upon the further ground, *demonstrated by the evidence*, that there is not the slightest reason to suspect that any Erichsrud, or Woodwick, ever heard

of this suit, or of any question concerning their respective titles, until, after Woodwick's purchase, the Supplemental Subpoena was served upon them respectively.

Counsel contended below that under what was then termed an "abstract" (to be found at p. 188 of the Record) Woodwick had *no record evidence* of title, and *therefore* could not claim to be a *bona fide* purchaser.

It must be remembered that under the *W. & St. P.* case he need be no more than such "a purchaser in good faith" as there defined.

But why do counsel affect to ignore the real abstract, "Defendant's Exhibit 3," beginning on page 173 of the Record, and identified by Woodwick as *the* abstract under which he purchased. (Record 153.) Of this abstract, Item 2 is the List certified by the State Auditor, and made evidence of title by Chapter 97 of Minnesota Laws of 1875, now Sections 4199-4202 of the Statutes of 1894; this goes to show the title *out of* the United States; without enumerating intervening items, Item 22 shows the Railway deed to O. C. Erichsrud, recorded June 8, 1888, and Item 23, the Final Decree of the Probate Court assigning the Erichsrud estate which was recorded on the same day as the deed to Woodwick, and was doubtless shown to him as well as recorded, and added to the abstract, in connection with his purchase.

In view of the course of judicial decision under the act of 1887, supplemented and limited by the additional precautions of the more liberal and more protective act of 1896, it seems almost superflous to argue

against any unsupported assertion of counsel, that the act of 1887 applies only to land *still* a part of the public domain—because if title to our tract "passed "by certification" as held in the *W. & St. P.* case, *it thereafter was no longer* a part of the public domain, and nothing but a revesting decree could restore it. Both acts plainly assume government *losses of title,* and provide for reclamation and recovery of titles or compensation for titles which have mistakenly *passed out of* the United States.

It has been the error of Government officers charged with the administration of these designedly beneficent acts, and of Counsel for Appellant, that they have mistaken the meaning of the terms "adjust" and "adjustment"; mistaken the *purpose* of each act —which was to accomplish *justice,* to "do the fair thing" under the circumstances of each case; to relieve, by confirmation or compensation, consequences of innocent mistake; mistakes solely of Government officers, which, without provision for relief, must result in hardship to investors no less innocent, no less meritorious than settlers, real or bogus.

Although in *U. S.* v. *So. Pac. R. Co.,* 184 U. S., 49, this Court at page 52, appreciatively declared that "These acts were passed *for the purpose* of upholding "ing the titles of parties who in good faith had pur- "chased from railroad companies lands which though "supposed to be part of their grants, proved not to "be so," these gentlemen assume that the chief object of these laws was to invite guerilla attack, to continue and bring to a finish the *pillage* of railroad grants, and to beggar investing citizens who have put their trust

and their funds into them and into supposed Government reliability.

IX.

COMPETENCY TO SUE. LACHES AND LIMITATIONS.

Appellant's "Fifth" and "Sixth" Assignments respectively relate to the competency of the United States to sue, and to the applicability to the United States of the doctrine of *laches* and of the Statute of Limitations.

If by the assertion that the United States can "*maintain*" this action is meant that the United States is, in a proper case a *competent person to become* a Complainant, and in that character to institute and bring to trial an equity suit for the cancellation of an erroneous certification or patent, we would not forbear admission of thus much without argument or citation.

But as to the alleged right of the United States successfully to maintain *this* action to a decree in its favor, or in Donovan's favor, or its right in *this* case to avoid the application of the statute of limitations or of the doctrine of *laches*, we respectfully dissent.

In a *W. & St. P.* case in 67 Fed., at page 972, we find the following enunciation of our Circuit Court of Appeals:

"Nor is it denied that 'when the government is a "mere formal complainant in a suit, not for the pur-"pose of asserting any public right or protecting any "public interest, title or property, but merely to *form* "*a conduit* through which *one private person can con-*

"*duct litigation against another private person*, a "court of equity *will not be restrained* from adminis- "tering the equities existing between the *real parties* "by an exemption of the government designed for "the protection of the rights of the United States "alone.' *U. S.* v. *Beebe*, 127 U. S., 338, 347; 8 Sup. "Ct., 1083; *Curtner* v. *U. S.*, 149 U. S., 662, 674; 13 "Sup. Ct., 985, 1041."

In *Curtner* v. *U. S.*, 149 U. S., 662, holding that in a suit brought for the benefit of private persons, where the Government is not interested in the result, the United States will be barred if the beneficiary would be barred, this Court, on page 674, (quoting and following *U. S.* v. *Beebe*, 127 U. S., 338), says, among other things, "the mere use of its name in a suit for "the benefit of a private suitor cannot extend its im- "munity as a sovereign government to said private "suitor, whereby he can avoid and escape the scrutiny "of a Court of Equity * * * nor stop the Court "from examining into and deciding the case accord- "ing to the principles governing Courts of equity in "like cases, between private litigants."

What can be more evident from the Bill itself, than that this suit is prosecuted *solely* for the benefit of Donovan, and that the United States *is* designed to be nothing but a "conduit" through which Donovan can conduct litigation at public expense, against other private persons?

In the sentence following the above quotation, our Circuit Court of Appeals added:

"But the United States sustains no such relation to "*this* suit."

On the contrary, defendant Donovan has here appeared and answered by Special Counsel for the United States, of course admitting the Bill, with picturesque and sweet resignation, though, as against him and without prejudice to him, the Bill might as well have gone *pro confesso;* and he thus appears and answers, by grace of the Appellant and its Special Counsel, *without leave of Court* or notice to Co-defendants, *several years after his right to answer had expired.* If this is not enough to demonstrate Donovan's interest as the sole motive of the suit, the department correspondence in the Record (120-128) and the whole course of previous Briefs of counsel for Appellant make the demonstration not only elaborate but conclusive.

And in this consists another difference of our case from the *Marshall* case; for the Circuit Court of Appeals there says (on page 972):

"The *only* evidence *tending* to show that this suit "is instigated by Marshall is the fact that he filed a "petition," etc.

Another difference: In Marshall's case it was said (on page 972): "The United States is *not without interest* in this suit."

Why? Because Marshall, being a pre-emptor, the United States, if successful, would receive from him at least $1.25 per acre.

Not so as to Donovan as Homesteader. If successful now, the United States can get from him no more than $5.00 under Section 2290, and $1.00 under Section 2238, not only for the land, but for its expenses

of suit—while it has been zealously claimed for Donovan that he paid these very driblets nearly thirty-four years ago, and will hereafter owe *nothing of price.*

In the Marshall case the Circuit Court of Appeals *did not* declare the *general* exemption of the United States "from the statute of limitations and from *laches*, but its exemption *in this case.*" (p. 972, at foot.)

This Court will not fail to discern the dissimilarity of Marshall's entry, situation, conduct and resulting rights to what is, in these particulars, claimed for Donovan under other contentions of the Appellant.

Marshall filed a pre-emption *before* the Definite Location, and his tract was originally and absolutely "*excepted from the grant.*"

In *U. S.* v. *San Jacinto Tin Co.*, 125 U. S., 273, 284 (cited by Appellant under the propositions now considered), the great Justice Miller, speaking, not in dissent, but as the organ of the unanimous Court said:

"*If* the doctrine that the United States in bringing "such actions is not controlled by any statute of limi- "tations, or governed by the rule concerning *laches*, "be sound * * * then the evil which may result "would seem to be endless as well as enormous."

So might Woodwick well think if his title is here made to fail.

But this protest in the San Jacinto case, was but a prelude, a *signal;* for in *U. S.* v. *Des Moines, &c. Co.*, 142 U. S., 510, at p. 538, it was further held, that

"Where the United States is only a formal party, "and the suit is brought in its name to enforce the

"rights of individuals, and no interest of the govern-
"ment is involved, the defense of laches and limita-
"tion will be sustained as though the government was
"out of the case, and the litigation was carried on in
"name, as in fact, for the benefit of private parties";
and in

U. S. v. *Bell Teleph. Co.*, 167 U. S., 240, *265*, it was said:

"But when it (the U. S.) has no proprietary or
"pecuniary result in the setting aside of the patent;
"is not seeking to discharge its obligations to the
"public; when it has brought the suit simply to help
"an individual; making itself, as it were, the instru-
"ment by which the right of that individual against
"the patentee can be established, then it becomes sub-
"ject to the rules governing like suits between pri-
"vate litigants."

And this contention is distinctly and abundantly sustained, and any contrary contention exploded by *Moran* v. *Horsky*, 178 U. S., 205, in which at page 213, the Court, without a dissent, said:

"But it is well settled, that when the *government*
"proceeds to set aside its patent, *not* for the sake of
"establishing its own right to the property, *but in the*
"*interest of some person who has an equitable claim*
"*thereto, or to whom the government owes the duty*
"*of protecting his interests, it is subject to the same*
"*defenses of laches, limitation and want of equity* that
"would attach to a like suit by an individual."

And on page 214, it was further said:

"Now, if the government, seeking, *in order to dis-*
"*charge its duty to the defendant*, to avoid so much

"of the patent as included this mining claim, is bound "by the *ordinary rules of equity in respect to laches, "etc., a fortiori* is it true that when he is the party "to the litigation the same equitable rules are bind- "ing on him. The government cannot, *when acting "for him,* avail itself of those principles of law which "are designed *simply for its own protection,* and no "more can he, in his own litigation, shelter himself "behind those principles. It is a private right which "he is relying upon, although a right created under "the laws of the United States, and as to this private "right he is subjected to the ordinary rules in re- "spect to the enforcement and protection of such a "right."

Let it be here observed that the Government was not a party in *Moran* v. *Horsky.* By the passages quoted therefrom, the Court but illustrated the infirmity of the case of the complainant by like weakness of a like case prosecuted for him by the Government—he, privately prosecuting, could not win, *because* the Government prosecuting for him, would be barred by laches, limitations or want of equity. In our case, it is nevertheless contended that Donovan's claims, irrecoverably gone, if prosecuted by him in his own name, are saved and invincibly assured to him, *because* the Government is prosecuting for his sake.

But if our quotations from *Moran* v. *Horsky* be law applicable to the case at bar, a vital question for decision is whether laches, limitations or want of equity would debar Donovan if himself complainant.

But this prosecution further seeks respectability of

morals under screen of the alleged parental "duty" of the United States to Donovan. No misnamed duty to Donovan can require the Sovereign to *perpetrate a gross wrong*, to install Donovan in an ownership which, subjected to the doctrine of laches and to the bar of statutes of limitations, he could not himself successfully assert. *There can be no Sovereign duty to* ROB *Peter in order to pay Paul.*

Notwithstanding any inventable semblance of duty, the United States, prosecuting solely in the interest of Donovan, should be held estopped and barred by whatever doctrine or statute would estop and bar him in his own private suit.

Besides the fifteen-year Minnesota statute in restraint of Ejectment, at least one other Minnesota statute of limitations, in force as far back as 1866, long ago ran against a cause of action which Donovan, when in actual possession, might have asserted against either Southern Minnesota Company, if not also against the Erichsrud survivors; *an action to determine adverse claims*, or to quiet title.

But quite aside from, in addition to, whatever in any party other than the United States would inevitably be adjudged gross laches, Donovan himself has been throughout guilty of such varied laches and waivers of claim as should in equity preclude recovery either by him or by the United States in his behalf.

What has Donovan so done or omitted, the doing or omission of which may well be presumed to have misled Erichsrud, his surviving widow and daughters, and Woodwick; and down to March 20, 1888, the Southern Minnesota Railway Company?

1. He easily consented to change of his application to enter;

2. He did not pay the $5 or the $1 payable on homestead entry of the tract in suit;

3. He did not appeal from the rejection of his application to enter, considered as not waived;

4. He made his actual residence upon the 80 entered, not upon the 80 in dispute.

5. He did not appeal from the rejection of his offer to prove up in 1875;

6. He omitted to bring suit to determine adverse claims, or quiet title, against the Southern Minnesota Railroad Company before its foreclosure; or against the Southern Minnesota Railway Company before its deed to Erichsrud;

7. He attempted independent entry of this 80 as an "adjoining farm homestead" in June, 1883;

8. When Thompson came on and ordered Donovan off, he *went* off, surrendering the cultivated portion, though his cattle continued to nibble pasture over the unfenced residue; he was not "forcibly excluded";

9. He did not appeal from the judgment of the state court rendered in January, 1888, in the suit *brought by himself* in 1885; *he accepted the decision of a tribunal of his own choice;* and *in that case, the fact,* and *the validity of the certification of this land* were put in issue *by Donovan's reply* to Thompson's answer;

10. His attempt to purchase from Mrs. Erichsrud at $19 per acre, three-fourths of the value to which he swears some years later:

(Here observe Donovan's method. At page 161 of the Record he makes it seem that Mrs. Erichsrud *opened* the correspondence proposing sale, and that he *only answered.*

Mrs. Erichsrud's testimony (Record 166), discloses two letters *from Donovan*—one, if not both, seeking to purchase; to which she replied by her one letter; and not content with correspondence, Donovan visited her for the same purpose.

This was a negotiation between a crafty man and a widow of usual ignorance concerning business.)

11. Donovan never paid a tax upon this land, does not appear to have assumed any burden or expense of ownership, though complacently willing to take all products of the land obtainable without resistance, as well as to co-operate heartily with the government in a litigation for his benefit, *which costs him nothing.*

In contrast with all these evidences of indifference, waiver, abandonment, we see, in the course of twenty years or more, one or two spasmodic assertions of interest, *concealed* (except his suit against Thompson), from public observation; severally inspired, perhaps by an adventurous attorney in search of fame or fee, perhaps by Donovan's chance to enlist a congressman of fame (John Lind) to serve without fee.

In a private suit of Donovan against Woodwick or against Erichsrud or against his surviving family, ought not, must not, the necessary effect of all this misleading conduct of Donovan be adjudged laches and preclude his recovery, as *inequitable?*

If so, should the United States, suing in place of

Donovan, and for his benefit, be permitted to ignore or override equities in favor of those defendants, which they could successfully oppose to his personal suit?

Is this a case in which the United States shall be permitted to evade limitations or laches; and this, solely because the whole foundation of Federal claim, if any, is the creation of misconduct or mistakes of its own officials?

Yet another item of laches, personal to the United States as complainant, ought of itself alone, to preclude recovery of this land from Woodwick, the one defendant (other than Donovan) now interested in the land as owner.

No *lis pendens* was filed in Faribault County to warn the Erichsrud family not to sell, or to warn Woodwick not to buy. And as heretofore noted, there is not the slightest reason to suspect that any Erichsrud, or Woodwick, ever heard of *this* suit, or unless in the record of Donovan's unsuccessful suit against Thompson, of any question concerning their respective titles, until the supplemental subpœna was served upon them respectively; and the brief of Mr. Purdy (pp. 74, 75) concedes that the mere pendency of the present suit was not constructive notice to Woodwick.

But notice of the Donovan-Thompson suit, tried, decided against Donovan plaintiff, and not appealed, was perfectly consistent with good faith in Erichsrud and in Woodwick; for this Court in *U. S.* v. *So. Pac. R. Co.*, 184 U. S., on p. 54, says: "A party *may have* "*notice* of conflicting claims, and still, in the exercise "of an honest judgment as to the rightful owner, buy

"property and pay for it, AND BE ACTING IN GOOD "FAITH."

While the maxim "*Prior in tempore, potior in jure*" is often a just maxim of equity as well as of law, it is no less true that an earlier equity, or an absolute legal right, *may lapse and cease* by reason of *subsequent conduct* of the party otherwise entitled to assert it.

As against the supplemental defendants (the Erichsrud survivors and Woodwick), this suit was brought in 1901, about thirty-three years after Donovan's attempt, close to thirty years after the certification, fourteen years after the act of 1887, thirteen years after purchase by Erichsrud. *By or for any of them*, may it not be well contended, that this claim is exceedingly "*stale*," if it ever had slightest merit?

It has been specially charged against Woodwick in one of the courts below, that "The evidence shows that "the defendant Woodwick purchased the land on specu- "lation, and never *occupied* it or expended a dollar "*upon* it; that neither he nor any party under whom "he claims ever erected *any building* upon the land or "expended any *money in its improvement*, except "plowing it up for crops."

What more did Donovan ever do? Donovan ploughed 18 to 20 acres in all—now, cultivation has extended to sixty-five acres,—to all except the wet portion of the land.

Woodwick paid full value, $25 cash per acre; Donovan's own valuation (Record 72). As to Woodwick's

good faith, and desert of confirmation in his title, it makes no conceivable difference whether he bought for his own occupancy as a farmer, or to rent to other farmers, or for an investment to await further rise in value.

We respectfully and without diffidence submit, that any supposed duty or tenderness of our government to deserving citizens will be best performed and most appropriately manifested, not by depriving Woodwick of land in which he has unsuspectingly invested $2,000, full value, upon the faith of every public record, and without slightest previous suggestion of any infirmity of title, but *by confirming his title;* and that both Courts below should be affirmed.

The "Seventh" alleged error of the Trial Court, being but a résumé of and inference from preceding assignments, requires no separate treatment, unless possibly this suggestion: The supposed conclusion of the Circuit Court, Lochren, J., "that Donovan made "a legal application to enter the land and paid for "the same," is not binding upon this court, cannot preclude this final Court from its own conclusion. We have presented our views against the *legality* of Donovan's application and against the *truth* of his pretences of payment. The remarks of a Trial Judge, in an oral opinion delivered immediately after argument, have not the force of the Verdict of a Jury, or of "findings of fact" by a Court sitting without Jury. They need not have been made, reported or filed, and in strictness they form no part of the record. The

whole evidence is now before this Court in the record, the appeal is general and from the decree, and the whole case is here for consideration *de novo*.

BURTON HANSON and
W. H. NORRIS,
Solicitors for Railway Companies, Appellees.

APPENDIX.

MINNESOTA STATUTES.

ACTIONS CONCERNING REAL PROPERTY.

Sec. 5134, Statutes of 1894 (a compilation):

"No action for the recovery of *real property* or for "the recovery of the possession thereof, shall be main- "tained unless it appears that the plaintiff, his ances- "tor, predecessor, or grantor was seized or possessed "of the premises in question within fifteen years be- "fore the commencement of the action."

Before Chapter 91 of 1889 (April 24, 1889), the corresponding provision was Section 4 of Chapter 66 of the General Statutes of 1866 (a revision), making *twenty* years the period of limitation.

The Act of 1889 only reduced the former "twenty" year period to the present "fifteen."

Sec. 5817 of said Statutes of 1894, gives an "*action to "determine adverse claims,*" as follows:

"An action may be brought by any person in *pos- "session*, by himself or his tenant, of real property, "against any person who claims an estate or interest "therein *or lien upon the same*, adverse to him, for "the purpose of determining such adverse claim, es- "tate, *lien* or interest; *and any person having or claim- "ing title to vacant or unoccupied real estate may "bring an action against any person claiming an es- "tate or interest therein adverse to him, for the pur-*

"*pose of determining such adverse claim, and the "rights of the parties respectively.*"

Of the last above, the first clause, except its italicised words as to *lien*, was Sec. 1 of Chap. 75 of the General Statutes of 1866 (a revision).

Chap. 68 of 1874 (Mch. 9, 1874) amended by adding the second clause (italicised) and inserting the italicised words of the first clause below the first line.

Supreme Court of the United States.

No. 54.—October Term, 1904.

The United States, Appellant, *vs.* Chicago, Milwaukee and St. Paul Railway Company et al.	Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

[December 12, 1904.]

The United States on the 6th day of March, 1893, filed this bill in the Circuit Court of the United States for the District of Minnesota for the purpose of setting aside the certification, under the land grant of Congress, (14 Stat. 87,) made by the Secretary of the Interior, of the land described in the bill, to the State of Minnesota, for the benefit of the railroad company, and also to set aside the conveyance thereof by the State to the railroad company, and by the company to one of the individual defendants. A supplemental bill was filed, by leave, March 4, 1901, bringing in by service of the supœpna other individual defendants.

The suit was brought under and pursuant to the act of Congress of March 3, 1887, (24 Stat. 556,) entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes."

Upon trial in the Circuit Court the bill was dismissed, and the decree of dismissal was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit, (116 Fed. Rep 969,) and from that decree of affirmance the Government has appealed here.

The facts upon which the controversy arose are, in substance, as follows: On the 4th day of July, 1866, Congress passed an act making an additional grant of lands to the State of Minnesota, (14 Stat. 87,) to aid in the construction of railroads in that State. The Southern Minnesota Railroad Company was at the time of the passage of the act of Congress a corporation organized under the laws of Minnesota, with the power to construct a line of railroad as mentioned in that act. The legislature of Minnesota, on the 25th day of February, 1867, transferred the land granted to it by the act of Congress to the railroad company, subject to the provisions of that act and also of the State statute.

Among the lands thus transferred was a lot eighty acres in extent, in Faribault County, Minnesota, being the property in dispute in this suit. The land was within the indemnity limits of the grant by Congress to the State, as determined by the map of definite location of the railroad, which

became effective February 25, 1867. The deficiency in what are termed the "place" lands was largely in excess of eighty acres. On the 29th day of November, 1870, the Southern Minnesota Railroad Company selected this tract in section 35 in lieu of part of the land lost in the granted limits, and the land was certified to the State of Minnesota by the Secretary of the Interior, March 25, 1871, for the benefit of the railroad company, and on the 8th day of August, 1871, the State of Minnesota conveyed it by deed to the railroad company. In March, 1868, the company had mortgaged all of its property, including the land granted under the act of Congress and all subsequently acquired property, to secure the payment of its bonds. This mortgage was foreclosed and the property sold and conveyed to a new corporation by the name of the Southern Minnesota Railway Company, and the land was conveyed to that company. On the 5th day of January, 1885, the railway company, by contract in writing, agreed to sell the land in dispute to one A. Boyeson for the sum named in that contract. Boyeson assigned his interest in the contract, on the 6th of January, to Fredericksen, who, on the 1st day of April, 1885, assigned it to the defendant, Thomas S. Thompson, and, in turn, on the 3d day of February, 1888, the latter assigned it to Ericksrud, who paid the balance due upon the contract and received the warranty deed for the land from the railway company on the 20th day of March, 1888.

Ericksrud died intestate on March 27, 1888, and on November 6, 1888, the land was decreed by the probate court to be the property of the widow and heirs at law of Ericksrud, and they remained in possession, and on the 24th of May, 1899, these heirs at law still being in possession, conveyed the same to the defendant Woodwick for the sum of two thousand dollars cash. This is the title of record coming from the United States to the State, thence to the railroad company and, by mesne conveyances, to the defendant Woodwick, and there was nothing of record showing that any other person was entitled to the land at the time when Woodwick paid the two thousand dollars to the heirs of Ericksrud and took the deed therefor. The defendant Donovan, however, lays claim to the land in question pursuant to the facts now to be stated.

Prior to the passage of the granting act of Congress, above referred to, one Luman Barclay had, on the 21st day of June, 1866, entered this land in controversy, and also the eighty acres in section 26, adjoining, as a homestead. In the following year (1867) Barclay abandoned the land and went to Canada. Some time after his departure, and in the same year, (1867,) Donovan, the defendant, sought to acquire a homestead on Government land. He examined the land for which Barclay had made his entry, and decided to enter it as a homestead. He went to the United States local land office for the purpose and was informed by the register

of the land office that he could not make the entry until Barclay's entry was cancelled. He was also informed that if he wished to make a claim that Barclay had abandoned his interest, he should publish notice of the time and place where he would make proof upon that matter. He published a notice accordingly, for three weeks, and paid nine dollars as the cost thereof, and in the fore part of August, 1867, made proof that Barclay had abandoned his homestead claim. Donovan insists that he was given to understand that he could enter the land as a homestead, as soon as the local land office received notice from the General Land Office at Washton that Barclay's entry was cancelled. He thereupon made one application to enter both tracts of land—the eighty acres in section 26 and the eighty-acre tract in question in section 35, but left the date of application blank, because he could make no entry for the lot in section 35 until Barclay's entry had been cancelled. He did this, as he or his witness Bullis said, to head off any other applicant for the land, and he left the application with the local land office. He then went into possession of section 26 and commenced the erection of a house thereon, and he says he commenced the cultivation of a small part of the tract in section 35. This was in the fall of 1867. The Barclay entry was duly cancelled at Washington on the 14th of January, 1868, and notice thereafter given to the local land office, and Donovan was notified of the fact. On the 6th day of June, 1868, Donovan went to the local land office and applied to enter the two tracts of land. He was there informed that the odd-numbered sections within twenty miles of the road had been withdrawn from market, and that such withdrawal included the section in question, and that he could not, therefore, enter the eighty acres in section 35 as a part of his homestead.

Donovan acquiesced in this determination of the local land office, and made his entry for the eighty acres in section 26. The old application for the two lots was destroyed and a new one made out for the lot in section 26. He thereafter used the land in section 35 in connection with his own in section 26, and cut grass upon and ploughed some of it, but it does not appear that he laid any claim to it as land which he had attempted to enter and which had been improperly or wrongfully refused him. His house and other permanent improvements were on section 26. At the time he made proof (in 1875) for the eighty acres in section 26, Donovan says he offered to make proof also as to the land in section 35, but his offer was rejected because, among other reasons, he had not entered the land in that section. He has obtained his patent for the eighty acres in section 26.

On the 26th day of June, 1883, Donovan applied at the local land office to enter this tract of land in section 35 as an additional homestead, under the act of March 3, 1879, (20 Stat. 472,) and the register certified that the application was for surveyed lands of the class the applicant was legally entitled to enter under the homestead act of 1862. In other

words, unappropriated public lands of the United States. The application was rejected upon the ground that the land so applied for had been certified to the State of Minnesota for the benefit of the railroad company. Donovan appealed from this rejection to the Commissioner of the General Land Office, where, it is stated, the matter is still pending and undetermined.

In 1885 the defendant Thompson, an assignee of the contract made by the railway company with Boyesen, went into possession of the eighty acres in section 35, and ordered Donovan off the same, and Donovan left the land accordingly. After Thompson took possession of the land, April 1, 1885, Donovan, in the same year, commenced a suit in the District Court of Faribault County to obtain possession of the land, and on or about the 24th of March, 1887, the State court decided that Donovan had no title to the land or right to the possession of the same, and that Thompson had the right to the possession thereof under the contract already mentioned. This judgment against him in the State court was never appealed from by Donovan, nor has it ever been vacated, modified or reversed. In 1888 Donovan applied to the Land Department at Washington for relief by reason of the act of Congress of March 3, 1887, heretofore referred to. In relation to that application the Commissioner of the General Land Office, on February 14, 1889, addressed a letter to the Secretary of the Interior, and therein spoke of Donovan's application for the institution of proceedings under that act of Congress, and said that Donovan had no title to the land, but he sent all the papers to the Secretary for review by him. On the 1st of April, 1889, the Secretary replied to the communication of the Commissioner of the General Land Office, and therein reversed his holding, and directed the latter to make a demand of the railway company for the reconveyance of the land, as provided for in the act. On the 12th of April, 1890, the Commissioner sent a communication to the Secretary, informing him that a demand for the reconveyance of the land had been made April 9, 1889, upon the railroad company, and that no answer had been made, although more than a year had elapsed since the demand. On the 16th of April, 1890, the Secretary of the Interior transmitted the letter to the Attorney General with a request that suit might be instituted to have the certification of the land in question by the Land Department to the State of Minnesota set aside and cancelled if, in the opinion of the Attorney General, the suit could be maintained. After waiting three years, and on the 6th of March, 1893, the United States filed its bill against the Chicago, Milwaukee and St. Paul Railway Company as successor in interest of the former companies, and also against the Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thompson and C. C. Ericksrud. On August 11, 1894, the companies answered the bill. Donovan did not answer it until

March 6, 1901, and then confessed the same, and prayed that the relief asked for might be granted. On March 4, 1901, the United States filed a supplemental bill, wherein it was stated that no service had ever been made upon Thompson or Ericksrud, and that on June 24, 1899, the heirs of Ericksrud had joined in a deed conveying the land in question to Louis K. Woodwick. Process was prayed against the defendants, the heirs of Ericksrud, and also against Woodwick, and subpœnas were served on them, and on May 2, 1901, they answered the supplemental bill. A special examiner was appointed to take testimony, and on the 13th of January, 1902, he submitted his report of the testimony taken in the suit, to the court.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

The Attorney General contends that before the passage of the act of Congress granting the land (July 4, 1866) Barclay had made legal entry upon the books of the local land office of the land in question, under the homestead laws of Congress, and that such legal entry was in existence at the time of the passage of the act of Congress of July 4, 1866; that by reason of such entry the land was excepted from the grant under that act, and that when Barclay abandoned his homestead claim upon the land it immediately became public land of the United States, and did not then pass under the grant to the State pursuant to the act of July 4, 1866, and it was therefore not legally withdrawn from market by any act of the Land Department, nor could it be certified to the State, and that the attempt to do so was not only erroneous, but absolutely void; that at the time when Donovan made application to enter the land, in June, 1868, it was part of the public lands of the United States, open to entry, and his application, although he had done all that he could, was wrongfully denied by the local land office; that thereafter the filing of the map of definite location by the railway company, and its selection of the land in question, and the certification of the land by the Secretary of the Interior to the State, and the conveyance by the State to the railway company, and the contract and conveyances following thereon, conveyed no interest in or title to the premises in question, but that they rightfully belonged to Donovan, and therefore the certification by the Land Department, etc., should be set aside, to the end that the land may be transferred to Donovan as demanded in the bill.

On the other hand, it is insisted on the part of the defendant Woodwick that the action of the Land Department officials in withdrawing the land in question from market was valid and within the jurisdiction of that department; that the selection of the land by the railway company was proper, as being within the indemnity limits of the grant by Con-

gress, and that its certification by the Secretary of the Interior to the State was within the power of that officer, and the act was not, therefore, beyond his jurisdiction, and that his certification and the action of the State conveyed a good title, or, at any rate, that the defendant Woodwick was a *bona fide* purchaser of the land, and as such his rights were preserved under the act of March 3, 1887. (24 Stat. 556.)

If Woodwick is protected under that act, as a purchaser in good faith, even against Donovan, it is unnecessary to pursue an inquiry as to the existence of any other defense. We are of opinion that Woodwick is protected under the fourth section of the act. The plain intent of that section is, as stated by Mr. Justice Brewer in delivering the opinion of the court in *United States* v. *Winona &c. Railroad*, (165 U. S. 463,) to secure one who in good faith and as an honest transaction purchases the land, and to leave to the Government a simple claim for money against the railroad. The justice said (pp. 280–281):

"It will be observed that the technical term '*bona fide* purchaser' is not found in this section, and while it is provided that a mortgage or pledge shall not be considered a sale so as to entitle the mortgagee or pledgee to the benefit of the act, it does secure to every one, who in good faith has made an absolute purchase from a railroad company, protection to his title irrespective of any errors or mistakes in the certification or patent.

". . . These being the provisions of the act of 1887, the act of 1896, (29 Stat. 42,) confirming the right and title of a *bona fide* purchaser, and providing that the patent to his lands should not be vacated or annulled, must be held to include one who, if not in the fullest sense a '*bona fide* purchaser,' has nevertheless purchased in good faith from the railroad company."

The counsel for the Government, while strenuously denying that the legal title to this land passed to the State of Minnesota, by virtue of the certification, in 1871, admits in his brief that if Woodwick bought the land as a *bona fide* purchaser in 1899, and acquired the legal title to the same, then at that present time not only was the right of the United States to recover the land defeated, but Donovan was precluded from thereafter asserting his claim to the land as against such *bona fide* purchaser. His denial that the legal title passed is based upon the contention that Donovan, before the year 1871, when the Secretary of the Interior certified this land to the State had, as stated by counsel, initiated proceedings to obtain this land in section 35 as a homestead, and had done all he could to make entry thereof, and had been in possession for three years before this certfication, and that prior to 1871 an initiatory title had passed from the United States to Donovan by reason of his possession and offer to enter the land, and his payment of the fees and expenses to the local land officers, so as to prevent the passage of the legal title to the State, by virtue of the certification referred to, which, by reason of the acts of

Donovan, was rendered wholly void. It is also asserted that if the United States, in 1871, did retain title in itself, notwithstanding Donovan's occupation and cultivation of the land, yet such occupation and cultivation withdrew the land from the jurisdiction of the Land Department, so far as any right or power to issue a certification to the railroad company was concerned, just as effectually as though the land had been reserved or otherwise appropriated specifically by an act of Congress.

We think that in 1871, when the certification was made, jurisdiction over this land remained in the Land Department, to be exercised by the Secretary of the Interior, notwithstanding the acts of Donovan as shown by this record. It is shown by the testimony of Donovan himself and of his witness Bullis, putting it all together, that there never was, in fact, any entry of this land at the local land office, in the name of Donovan, before the certification in 1871. The facts as to what took place at that office in regard to the applications of Donovan in 1867 before the Barclay entry was cancelled, and in June, 1868, when the entry was made for the lot in section 26, are set forth in the statement of facts herein, and need not be repeated. The statement shows no such facts as put Donovan in the place of one who, having done all he could to enter the land, had been refused such entry, but had nevertheless not acquiesced in such decision and had taken possession of it as a homestead. On the contrary, Donovan did acquiesce in that decision and amended his application.

There was no entry made on the books of the local land office for this land under the amended application, and the power of the Secretary of the Interior to make the certification, even if we assume that it was erroneously exercised, was not an act which was beyond the jurisdiction of the Secretary. The legal title was thus transferred by the Government to the State, and at the most it was an erroneous certification within the meaning of the act of 1887. Although under such circumstances, if the certification were erroneous and might have been avoided and the land recovered back by the Government while in the hands of the railroad company, yet Woodwick, if a purchaser in good faith of the lands, was entitled to them under the provisions of the act. He had no notice, actual or constructive, of the claim of the Government in regard to this land. The record title was plain. No suit had been commenced when Ericksrud took his title from the Government and went into possession thereunder. He died within a week thereafter, and his heirs thereupon took possession. They were in possession when the Government commenced this suit, in 1893, but were never served with process therein until 1901, which was two years after Woodwick had purchased the property from them and had in good faith paid them the sum of $2,000 in cash for the land.

Counsel for the Government admits that it is futile to maintain that Woodwick had constructive notice of the defects in his title by reason of

the pendency of this suit, which had been commenced by the Government in 1893, but in which the railroad companies alone had been served with process.

Whatever equities Donovan may have had as against the Government by virtue of his so-called attempt to make entry for the eighty acres in section 35, they do not override the plain provisions of the statute of 1887, and also that of 1896, (29 Stat. 42,) which save the rights of one who purchased from the railroad in good faith.

As was observed by Mr. Justice Brewer, in the case already referred to, (*United States* v. *Winona &c. R. R. Co.*, 165 U. S. at 480,) "It matters not what constructive notice may be chargeable to such a purchaser if, in actual ignorance of any defect in the railroad company's title and in reliance upon the action of the Government in the apparent transfer of title by certification or patent, he has made an honest purchase of the lands."

Donovan is not brought within the case of *Winona &c. R. R. Co.* v. *United States*, immediately following the above-cited case, at page 483, because, among other facts, it appears herein that there was no record of any entry in Donovan's case for this land on the books of the local land office, and it is conceded that he had been out of any possession of the land since 1885. The above-cited case is not, therefore, in point. The same may be said of *Duluth* v. *Roy*, (173 U. S. 587,) and *Oregon &c.* v. *United States*, (Nos. 1 and 2,) (189 U. S. 103–116.)

Donovan cannot be regarded as having by his action secured a vested interest in this land, so as to make the certification to the State a wholly void act, as an act beyond the jurisdiction of the Secretary. Assuming that it may have been erroneous and voidable, it was not void. We do not decide it was erroneous. In 1871 the legal title, still remaining in the Government, was transferred to the State by the certification of the Secretary, and, as we have said, Woodwick occupied the position of a purchaser in good faith under the acts of Congress.

The judgment is *Affirmed.*

True copy.

Test:

Clerk Supreme Court, U. S.